

Ministère de la Justice Canada

NUMERO DU DOSSIER/FILE #: 2016-006296 COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Bill C-36, the Protection of Communities and Exploited Persons Act

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- On March 31, 2016, you are scheduled to meet with the University Women's Club of Vancouver. The issue of prostitution will be discussed.
- You have committed to review the adequacy of former Bill C-36 in responding to all the issues identified by the Supreme Court of Canada's December 2013 *Bedford* decision, as well as to monitor the impact of these reforms.
- The University Women's Club of Vancouver has long advocated for a Nordic model in Canada
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s.21(1)(a) s.21(1)(b)

Soumis par (secteur)/Submitted by (Sector): Policy Sector	
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Revue dans l'ULM par/Edited in the MLU by:	•

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Protected B FOR INFORMATION

2016-006296

MEMORANDUM FOR THE MINISTER

Bill C-36, the Protection of Communities and Exploited Persons Act

ISSUE

On March 31, 2016, you are scheduled to meet with the University Women's Club of Vancouver. Founded in 1907, this organization seeks to promote the rights of, and opportunities for, women and regularly studies issues relating to the status of women, human rights education and the environment. The issue of prostitution is likely to be discussed during your meeting.

BACKGROUND

On December 20, 2013, the Supreme Court of Canada (SCC) rendered its decision in *Bedford* and held that three *Criminal Code* prostitution provisions violated section 7 of the *Charter*. The *Protection of Communities and Exploited Persons Act* (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and girls (often referred to as a version of the "Nordic Model", first implemented in Sweden in 1999). Bill C-36 criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which makes prostitution illegal (the Bill immunizes sellers of sexual services from prosecution for the role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3);
- advertising the sale of others' sexual services (section 286.4); and,
- communicating for the purpose of selling sexual services in public places that are or are next to school grounds, playgrounds and day care centres (subsection 213(1.1)).

These new offences replaced old offences that criminalized bawdy houses (section 210), procuring (section 212) and communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)). Two offences (paragraphs 213(1)(a) and (b)), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose of selling or purchasing sexual services.

Complementary funding

To complement Bill C-36's reforms, \$20M in new funding has been allocated to support a range of social programming for those who wish to leave prostitution. To date, thirteen non-governmental organizations are receiving funding through Justice Canada's Victims Fund to support their projects, which began in fiscal year 2014-2015, totaling \$8.7M over the

five years of the initiative. As well, 10 law enforcement agencies are also being funded over the initiative's five years, totaling \$0.7M.

CONSIDERATIONS

s.14 s.21(1)(a) s.21(1)(b)

Prostitution and the legal responses to it remain a divisive and controversial issue both within Canada and internationally. Some view prostitution as legitimate work, which should be decriminalized and regulated (i.e., supporters of decriminalization or legalization), while others

view it as a form of sexual exploitation of women and girls, which must be ended (i.e., supporters of abolition, or the "Nordic Model"). Conflicting values of autonomy (i.e., protecting an individual's right to choose to sell their own sexual services by allowing sex work) vs. the public good (i.e., protecting the vulnerable people that research shows are drawn to prostitution by disallowing all sex work) drive the debate. This debate generally centres on whether decriminalization or abolition is the appropriate legal response:

- **Decriminalization**: involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat prostitution like any other occupation and thereby reduce the risks and harm associated with it (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- Abolition ("Nordic Model"): involves criminalizing those who "exploit" sellers of sexual services (clients and third parties) and decriminalizing sellers themselves, who are viewed as victims and assisted through new-funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for sexual exploitation (implemented in Sweden in 1999, Norway and Iceland in 2009, and Canada in 2014).

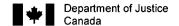
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University Women's Club of Vancouver (UWCV)

The UWCV has long advocated for measures to address and abolish the trafficking of women and girls for the purpose of sexual exploitation and prostitution. They have specifically advocated for the adoption of a Nordic model in Canada.

CONCLUSION

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Protected B 2016-006296

Talking Points Meeting with the University Women's Club of Vancouver: Bill C-36, the *Protection of Communities and*Exploited Persons Act

- First, I would like to thank your organization for the important contributions you have made to the ongoing debate surrounding how Canada's criminal laws respond to prostitution.
- I am aware of your organization's support for Canada's current legal response to adult sex work, as enacted by former Bill C-36.
- Our Government is committed to reviewing all the available evidence on this issue to ensure that Canada's approach is evidence-based.
- You should know that we share your views on the importance of ensuring that vulnerable women and girls are protected from exploitation, including through appropriate criminal laws.
- We will be monitoring the impact of the changes brought about through Bill C-36, and will be engaging in a broad consultation including with those most affected by the new legislation.

s.21(1)(a)

s.21(1)(a)

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Ministère de la Justice Canada

SCENARIO

Numero du Dossier/File #: 2016-005605 Cote de sécurité/Security Classification: Protected B

TITRE/TITLE: Meeting with Pivot Legal Society

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- You have agreed to meet with members of Pivot Legal Society (Pivot) on March 29, 2016, in Vancouver (location is to be determined). An official from your office will accompany you at this meeting (official to be confirmed). Pivot representatives will be: Darcie Bennett, Interim Executive Director, Brenda Belak, Staff Lawyer, and Kerry Porth, Board Chair.
- Pivot Legal Society, is a non-governmental organization founded in 2000 to provide legal tools for people living in the Downtown Eastside of Vancouver. Pivot has been involved in legal challenges, public engagement, and legal campaigns on topics such as accountable policing, housing, health and drug policy reform, and sex workers rights to bring positive change for people living in poverty.
- As per correspondence dated January 21, 2016, Pivot would like to discuss two issues with you: 1) Pivot's position against former Bill C-36, the *Protection of Communities and Exploited Persons Act*, which implemented a criminal law approach to prostitution in December 2014 (Canada's "Nordic Model"); and 2) Pivot's proposed reforms pertaining to laws and policy on drug issues, particularly with respect to harm reduction.

s.21(1)(a) s.21(1)(b)

Soumis par (secteur)/Submitted by (Sector): Policy Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Caroline Leclerc

Revue dans l'ULM par/Edited in the MLU by:

Matt Ignatowicz

Soumis au CM/Submitted to MO: March 24, 2016

Ministère de la Justice Canada

> SCENARIO Protected B

2016-005605

MEMORANDUM FOR THE MINISTER

Meeting with Pivot Legal Society

ISSUE

You have agreed to meet with the representatives from the Pivot Legal Society (Pivot) on Tuesday, March 29, 2016, from 1:00 p.m. to 1:45 p.m. in Vancouver (location to be determined). An official from your office will accompany you at this meeting (official to be confirmed). Pivot representatives will be as follows: Darcie Bennett, Interim Executive Director, Brenda Belak, Staff Lawyer, and Kerry Porth, Board Chair. Biographies are located at Tab 3.

BACKGROUND

This will be your first meeting with the Pivot Legal Society as Minister of Justice. Note that your officials met with Pivot representatives in February 2016 and those in attendance were: Sean Casey, Member of Parliament, and from your office and Pivot representatives Katrina Pacey, Executive Director, Brenda Belak, Lawyer, and Kerry Porth, Board Chair.

Pivot Legal Society was founded in 2000 by John Richardson, law school graduate, in order to provide people living in the Downtown Eastside of Vancouver with the legal tools they needed to combat daily legal problems. Since its inception, Pivot has been involved in legal challenges, legal education campaigns, public engagement, and innovative projects that highlight the struggles of people living on the margins of society, all towards the goal of social and systemic change. Legal campaigns have been carried out on topics such as accountable policing, housing, health and drug policy reform, and sex workers rights to bring positive change for people living in poverty.

CONSIDERATIONS

Correspondence from Pivot Legal Society dated January 21, 2016, is annexed to this note. Pivot has indicated that it would like to discuss the two issues below during your upcoming meeting.

1) Prostitution Laws and the Protection of Communities and Exploited Persons Act

Pivot Legal Society is a Vancouver-based, non-governmental organization that supports decriminalization of adult prostitution. In 2014, Pivot representatives provided testimony before the Senate Committee on Legal and Constitutional Affairs when it studied Bill C-36. At your March 29 meeting, Pivot intends to discuss their position against former Bill C-36, the

page 1 of 3 Scenario Note - Meeting with Pivot Legal Society

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Protection of Communities and Exploited Persons Act, which implemented a criminal law approach to prostitution in December 2014 (Canada's "Nordic Model").

s.21(1)(a)

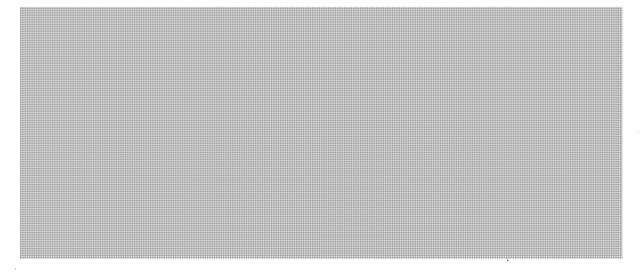
s.21(1)(b)

You have committed to review the adequacy of former Bill C-36 in responding to all the issues identified by the Supreme Court of Canada's December 2013 *Bedford* decision, as well as to monitor the impact of these reforms. You have also indicated that the Government will be consulting those most affected by the new legislation in undertaking this review, including sex workers.

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Briefing materials and proposed Talking Points on this issue can be found at Tab 1.

2) Legal Reforms To Increase Access to Harm Reduction and Addiction Treatment, Including Reforms to the Respect for Communities Act



s.21(1)(a) s.21(1)(b)

Briefing materials and proposed Talking Points on this issue can be found at Tab 2.

CONCLUSION

This preliminary meeting will provide you with the opportunity to better understand Pivot Legal Society's work, law reform activities, and positions on important issues. You may wish to direct Pivot to continue its discussions with the Department's Policy Sector.

ANNEXES

Annex A: Letter from Pivot Legal Society to Minister Wilson-Raybould (January 21, 2016)

Annex 1: Briefing note on Bill C-36, the *Protection of Communities and Exploited*

Persons Act and Talking Points

Annex 2: Briefing note on Information on Harm Reduction for a Meeting with Pivot Legal

Society and Talking Points

Annex 3: Biographies

PREPARED BY

Bonnie Lidstone Senior Advisor Intergovernmental and External Relations Division Policy Sector 613-946-9282



January 21, 2016

Reply to: Katrina Pacey

s.19(1)

Direct Line:

E-mail: katrina@pivotlegal.org

The Honourable Jody Wilson-Raybould Minister of Justice and Attorney General House of Commons Ottawa, Ontario K1A 0A6

Dear Honourable Minister Wilson-Raybould,

I write to you to express my sincere congratulations on your appointment as Minister of Justice and Attorney General. You bring incredible vision, experience, and expertise to this portfolio, and we are thrilled that you are in this important leadership role.

I am the executive director of Pivot Legal Society, a human rights organization in Vancouver that works on many of Canada's most pressing human rights issues.

Our legal campaigns focus on law and policy reform that will improve the health, safety, and human rights of marginalized communities: people who use drugs, sex workers, homeless and under-housed people, and Indigenous and other communities who are disproportionately impacted by policing and incarceration. We create change in these areas through strategic and constitutional litigation, and through collaboration with government on law reform strategies.

Over the past fifteen years, Pivot has become a leading expert on policy issues that are noted in your mandate letter as key priorities. We hope that our knowledge on these issues and our analysis of the unconstitutionality of specific legislation will be of assistance to you as you review your litigation strategy and develop positions that are consistent with your government's commitments, the *Charter* and Canadian values.

While I realize you face extraordinary demands on your time, I write to ask that you consider meeting with me and other members of my team to discuss the way forward on a number of pressing human rights issues.

First, we would like to meet with you to discuss Canada's prostitution laws. I was counsel for street-based sex workers in Bedford v. Canada and Sex Workers United

Against Violence v. Canada. Through that litigation, Pivot has developed extensive expertise on the issue of sex work and the laws in Canada and throughout the world.

We were grateful to your party for voting against the harmful prostitution laws that were brought into force by the previous government. As expected, the *Protection of Communities and Exploited Persons Act* is reproducing the same harms as the laws that were struck down through the *Bedford* case. Sex workers continue to face barriers to health, safety, and human rights under the new legislation. We would like to share our analysis with you and support your government to develop laws and policies that will provide the greatest protections to people involved in the sex industry, and communities overall.

Second, Pivot has been working on law reform initiatives that would improve access to harm reduction and addiction treatment programs. We are very grateful for your government's work in this area to date, including the granting an exemption to the Dr. Peter Centre so they can offer life-saving supervised injection services, and Health Canada's proposed reforms regarding non-prescription use of naloxone. We would appreciate the opportunity to discuss legal reforms that will increase access to harm reduction and addiction treatment more broadly in Canada, including reforms to the Respect for Communities Act, which creates inordinate barriers to supervised injection services.

We would be very grateful to have the chance to meet with you while we are in Ottawa on February 16 and 17, 2016, or when you are back in your riding. We look forward to supporting you with your important mandate.

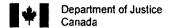
Yours truly,

PIVOT LEGAL SOCIETY per:

s.19(1)

Katrina Pacey
Executive Director | Lawyer

121 Heatley Ave · Vancouver BC · V6A 3E9



Ministère de la Justice Canada

Tab 1
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FOR INFORMATION

2016-005605

MEMORANDUM FOR THE MINISTER

Bill C-36, the Protection of Communities and Exploited Persons Act

ISSUE

In late March 2016, you are scheduled to meet with Pivot Legal Society, a Vancouver-based non-governmental organization that supports decriminalization of adult prostitution. Pivot intends to discuss their position against former Bill C-36, the *Protection of Communities and Exploited Persons Act*, which implemented a criminal law approach to prostitution in December 2014.

BACKGROUND

On December 20, 2013, the Supreme Court of Canada (SCC) rendered its decision in *Bedford* and held that three *Criminal Code* prostitution provisions violated section 7 of the Charter because they prevented prostitutes from taking steps to protect themselves when engaged in a risky but legal activity. In a similar British Columbia action, *Downtown Eastside Sex Workers United Against Violence Society* (DESWUAV), the SCC granted the claimant, a group representing street-based sex workers from Vancouver's Downtown Eastside, public interest standing (September 2012). In light of the result in *Bedford*, that action was ultimately abandoned. Katrina Pacey, executive director of Pivot Legal Society, was counsel for street-based sex workers in both *Bedford* and DESWUAV.

The *Protection of Communities and Exploited Persons Act* (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and girls (often referred to as a version of the Nordic Model, first implemented in Sweden in 1999).

The Protection of Communities and Exploited Persons Act Bill C-36 criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which makes prostitution illegal (the Bill immunizes sellers of sexual services from prosecution for the role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3);
- advertising the sale of others' sexual services (section 286.4); and
- communicating for the purpose of selling sexual services in public places that are or are next to school grounds, playgrounds and day care centres (subsection 213(1.1)).

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These new offences replaced old offences that criminalized bawdy houses (section 210), procuring (section 212) and communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)). Two offences, paragraphs 213(1)(a) and (b), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose of selling or purchasing sexual services.

Bill C-36 also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which Bill C-36 treats as related criminal conduct. Notably, in trafficking for sexual exploitation cases, both trafficking in persons and prostitution charges are frequently laid, among others (see below).

Justice Canada's Bill C-36 Technical Paper¹ explains the intended scope of Bill C-36's offences, its legislative objectives, and the evidence considered in developing the Bill. It was tabled before both the House of Commons Committee on Justice and Human Rights and the Senate Committee on Constitutional and Legal Affairs and forms part of the Parliamentary record on Bill C-36.

Complementary funding

s.14 s.21(1)(a) s.21(1)(b) To complement Bill C-36's reforms, the Government has dedicated \$20 million in new funding to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through existing Justice Canada and Public Safety Canada funds to various non-governmental organizations, many of which supported Bill C-36's overall approach, as well as to certain police forces. For example, to date, 13 non-governmental organizations are receiving funding through the Victims Fund to support their projects, which began in fiscal year 2014-2015, totaling \$8.7 million over the five years of the initiative. As well, 10 law enforcement agencies are also being funded over the initiative's five years, totaling \$0.7 million.

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¹ Originally published in July 2014, updated in December 2014, and available online: http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf.

s.14 s.21(1)(a) s.21(1)(b) s.23

International debate on prostitution

Prostitution and the legal responses to it remain a divisive and controversial issue both within Canada and internationally. Some view prostitution as legitimate work, which should be decriminalized and regulated (i.e., supporters of decriminalization or legalization), while others view it as a form of sexual exploitation of women and girls, which must be ended (i.e., supporters of abolition or the "Nordic Model"). Conflicting values of autonomy (i.e., protecting an individual's right to choose to sell their own sexual services by allowing sex work) vs. the public good (i.e., protecting the vulnerable people that research shows are drawn to prostitution by disallowing all sex work) drive the debate.

Both internationally and domestically, the prostitution debate generally centres on whether decriminalization or abolition is the appropriate legal response:

- Decriminalization: involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat prostitution like any other occupation and thereby reduce the risks and harm associated with it (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- Abolition (Nordic Model): involves criminalizing those who "exploit" sellers of sexual services (clients and third parties) and decriminalizing sellers themselves, who are viewed

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as victims and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for sexual exploitation (implemented in Sweden in 1999, Norway and Iceland in 2009, and Canada in 2014).

Perspectives on Bill C-36 and the Charter

Consistent with the ongoing international debate, Bill C-36, Canada's version of the Nordic Model was hotly debated in Parliament. Stakeholders who support decriminalization vehemently opposed it; for example, in September 2014, Pivot Legal Society testified before the Senate Committee on Constitutional and Legal Affairs to this effect. Stakeholders who support abolition, including the Native Women's Association of Canada (NWAC) and anti-human trafficking activists, advocated amending it to ensure that sellers of sexual services are not criminalized (i.e., repeal of section 213).

Both before and during Parliament's consideration of Bill C-36, open letters were published by lawyers and legal academics representing both sides of the debate.² Supporters of abolition expressed the view that the Nordic Model protects the section 15 Charter rights of "prostituted" persons" (i.e., their definition of "sex workers"), because they view prostitution as disproportionately and negatively impacting on women and girls. Supporters of decriminalization, including Pivot Legal Society, expressed the view that the Nordic Model violates the section 7 Charter rights of sex workers by making it less safe for them to practice their chosen profession.

Available research

s.21(1)(a)

s.21(1)(b)

s.23

Evidence, including both quantitative and qualitative research, exists to support both decriminalization and abolition. This evidence informed the development of Bill C-36 and is referenced in Justice Canada's Technical Paper, including a research report commissioned by Pivot Legal Society entitled. "Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study." This report, published in the British Medical Journal Open and released on June 3, 2014, while Bill C-36 was being studied by Parliament, studied a small sample of Vancouver-based sex workers (31 persons), over a short period of time (11 months), under the previous approach to prostitution, and concluded that criminalizing the purchase of sexual services would endanger sex workers.

² https://bccla.org/wp-content/uploads/2014/07/LetterC36.pdf; http://www.straight.com/news/74235/open-lettercalls-nordic-approach-prostitution-canada.

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Talking points				
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2016-005605

Talking Points

Meeting with Pivot Legal Society; Bill C-36, the Protection of Communities and Exploited Persons Act

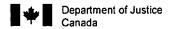
- First, I would like to thank you for the important contributions you have made to the debate surrounding adult sex work. These contributions include your testimony before the Senate Committee on Legal and Constitutional Affairs when it studied former Bill C-36, the *Protection of Communities and Exploited Persons Act.*
- I am aware of your organization's concerns about Canada's current legal response to adult sex work, as enacted by former Bill C-36.
- I want to reassure you that my officials are reviewing all the available evidence on this issue to ensure that Canada's approach is evidence-based.

- You may also know that I have committed to review
 the adequacy of former Bill C-36 in responding to all
 the issues identified by the Supreme Court of
 Canada's December 2013 Bedford decision. As you
 know, that decision found previous prostitution laws
 unconstitutional because they prevented sex
 workers from taking steps to protect themselves
 when engaging in a risky but legal activity.
- We are committed to monitoring the impact of former Bill C-36, and will be engaging those most affected by the new legislation in undertaking this review.

s.21(1)(a) s.21(1)(b)

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s.21(1)(a) s.21(1)(b)



Ministère de la Justice Canada

Tab 2
Secret
FOR INFORMATION

2016-005605

MEMORANDUM FOR THE MINISTER

Information on Harm Reduction for a Meeting with Pivot Legal Society

ISSUE

You have agreed to meet with Pivot Legal Society (Pivot) on March 29, 2016, to discuss its proposed reforms pertaining to laws and policy on: 1) prostitution; and 2) drug issues, notably harm reduction.

s.21(1)(a) s.21(1)(b)

BACKGROUND

In a letter dated January 21, 2016, Katrina Pacey, Executive Director of Pivot Legal Society, requested a meeting with you to discuss, among other issues, Pivot's proposed legal reforms to improve access to harm reduction and addiction treatment programs in Canada. These include reforms to Bill C-2, the *Respect for Communities Act*, which Ms. Pacey described as "creat[ing] inordinate barriers to supervised injection services."

Harm reduction: An overview

While there is no nationally or internationally accepted definition of harm reduction, it can generally be understood as part of a public health approach to drug control. Harm reduction includes measures (policies, programs, and/or initiatives) that aim to reduce the negative health and social impacts associated with substance use at the individual and community level (e.g., injury, infectious disease transmission, crime, overdose, death, etc.) without requiring abstention from drug use. Such measures are generally viewed as part of the continuum of prevention and treatment services. Examples include: supervised consumption sites, naloxone (opioid-overdose reversing medication) programs, good samaritan legislation, heroin-assisted treatment, and needle exchange programs.

Canada's approach to, and support for, harm reduction as part of federal drug policy has shifted over time. Between 1987, with the launch of the first national drug strategy, and 2006, drug policy took an approach that was inclusive of a public health perspective and harm reduction. Canada's Drug Strategy (CDS) was replaced by the National Anti-Drug Strategy (NADS) in 2007. While prevention and treatment remained key pillars of the NADS, the harm reduction pillar, which had existed under CDS, was eliminated, causing concern among many stakeholders.

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Key harm reduction-related issues and developments

Supervised consumption sites and Bill C-2, Respect for Communities Act

Supervised consumption sites (SCSs, also known as "supervised injection sites or services") are controlled settings where individuals can bring illicit drugs to use under the supervision of health care professionals. They are intended to address public disorder, overdose deaths, and the spread of blood-borne diseases, such as HIV and hepatitis C, while providing drug users with access to health and social services, including treatment.

There are currently over 85 SCSs internationally, with the majority in Western Europe, and one in Australia. There are no sites in the U.S. or the United Kingdom. In Canada, SCSs require a section 56.1 exemption under the *Controlled Drugs and Substances Act* (CDSA) to be granted by the Minister of Health, in order to operate legally. There are currently two authorized SCSs, Insite and the Dr. Peter Centre, both located in Vancouver.

The SCS at Insite opened in 2003, at which time Health Canada granted the Vancouver Coastal Health Authority (VCHA) a three-year exemption under section 56 of the CDSA, for scientific purposes, to permit a pilot study of supervised injection. Health Canada provided approximately \$1.5 million to fund only the evaluation component of the project, which was carried out by the British Columbia Centre for Excellence in HIV/AIDS. The exemption was extended twice, up to 2008, but no additional funding was provided.

Concerned that Insite's 2008 application for extension would not be granted, several interested organizations launched legal actions against the Government, challenging the constitutionality of the possession and trafficking provisions (subsections 4(1) and 5(1)) of the CDSA. In 2008, in the course of the summary trial, the section 56 exemption for Insite expired, and the claimants sought to renew it. Given the trial judge's ruling in favour of the claimants, they were informed that an exemption was not required at that time. The Government of Canada filed an appeal of the British Columbia Supreme Court decision on Insite on May 29, 2008.

The case made its way to the Supreme Court of Canada (SCC) and, in September 2011, the SCC rendered a decision. It upheld the constitutionality of the CDSA, but held that a decision to refuse Insite's exemption did not balance public health and public safety in accordance with the Charter. As a result, the SCC ordered the Minister of Health to grant Insite an exemption. Further, the SCC specified five factors that the Minister must consider when assessing an application for an SCS: evidence, if any, related to the impact of a site on crime rates; local conditions indicating a need for such a site; the regulatory structure in place to support the facility; resources available to support its maintenance; and expressions of community support or opposition.

In response to the SCC's decision, in October 2013, the Government introduced amendments to the CDSA through Bill C-2, the *Respect for Communities Act* (RCA). The RCA came into force on June 30, 2015. It includes a section specific to SCSs (s.56.1(3)), and sets out 26 criteria that must be addressed before the Minister of Health can assess an application and consider an exemption for a SCS, including criteria aligned with the five factors outlined by the Court. Among other requirements, applicants have to demonstrate the need for the site, comprehensive

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procedures to protect health, safety and security of staff and users, and diverse community stakeholder support for the site. Health Canada conducts an assessment of the application, an inspection of the facility, and establishes terms and conditions for the exemption.

Public response to the RCA was mixed. There was general support for its focus on community consultation, but a number of stakeholders, including public health leaders, legal networks, public health advocacy groups, parliamentarians, some municipalities, and both British Columbia and Quebec, were highly critical of the criteria it set out.

On March 16, 2016, Health Canada issued a four-year section 56.1 exemption from the CDSA to VCHA for Insite to continue to operate a SCS until 2020. In previous years, Health Canada provided only one year extensions. The exemption was reported in a March 18, 2016, Globe and Mail article.¹

The Dr. Peter Centre, an HIV/AIDS clinic, was granted a two-year exemption under the CDSA on January 15, 2016, to provide SCS services for its clients. The Centre had previously been offering the services to registered clients in a small-scale setting since 2002, without an exemption. The exemption application to Health Canada was jointly submitted by VCHA and the Dr. Peter AIDS Foundation.

Naloxone

Recent reports in Canada have noted a marked increase in the number of overdoses and deaths associated with opioids, in particular fentanyl, a synthetic opioid 50 to 100 times stronger than morphine or heroin. Public health and law enforcement officials have flagged that illicit fentanyl mixed with other drugs (e.g. heroin) or sold to individuals disguised as oxycodone, is leading to overdoses and deaths among users unfamiliar with its extremely high potency.

A number of stakeholder groups and drug abuse prevention organizations have also called for increased access and availability of naloxone.

On March 22, 2016, Health Canada posted a Notice of Amendment indicating that, as a result of consultation, it had revised the listing for naloxone on the Prescription Drug List to allow its non-prescription use for opioid overdoses that take place outside of hospital settings.

Page 3 of 7

¹ Andrea Woo, "Supervised injection site Insite gets green light for next four years," Globe and Mail, British Columbia, S4, March 18, 2016: http://www.theglobeandmail.com/news/british-columbia/supervised-injection-site-insite-gets-green-light-for-next-four-years/article29286193/

Good samaritan legislation and Private Member's Bill C-224, the Good Samaritan Drug Overdose Act

Good samaritan legislation (GSL) is a harm reduction measure that encourages individuals who experience or witness an overdose, to contact and cooperate with emergency personnel in exchange for immunity from arrest or prosecution for minor drug offences. It is based on the rationale, as borne out in international studies, that individuals are often afraid to call for emergency assistance due to fear (e.g., of arrest, criminal charges, losing custody of children, or the cost of medical assistance).

GSL has been implemented in at least 34 states in the U.S. As an alternative to GSL, some jurisdictions, including Vancouver and parts of Australia and the United Kingdom, have developed law enforcement policies whereby police will not initiate investigations or make arrests at the scene of a drug overdose, or police will not attend an overdose call unless extenuating circumstances are present (e.g., threat of violence).

A range of public health stakeholders have publicly called on the federal government to enact GSL in Canada, including the Canadian Medical Association, the Canadian Drug Policy Coalition, the Canadian HIV/AIDS Legal Network, the Canadian Harm Reduction Network, and the Municipal Drug Strategy Coordinator's Network of Ontario (which represents over 155 municipalities in Ontario).

On February 22, 2016, Member of Parliament Rob McKinnon (Liberal Party of Canada, Coquitlam – Port Coquitlam), introduced Private Member's Bill C-224, the *Good Samaritan Drug Overdose Act*, in the House of Commons.

Bill C-224 is a harm reduction measure that proposes to amend the CDSA to exempt from charges for simple possession (subsection 4(1)), a person who seeks emergency medical or law enforcement assistance for themselves or another person experiencing an overdose from a controlled substance. This Bill would also exempt any person from such charges who is at the scene of the overdose when medical or law enforcement arrive. As the proposal is to exempt from prosecution persons who have committed a crime, the proposal affects the criminal justice system.

Bill C-224 could have its first hour of debate at second reading the week of April 18, 2016.

Heroin-assisted therapy and the Providence litigation

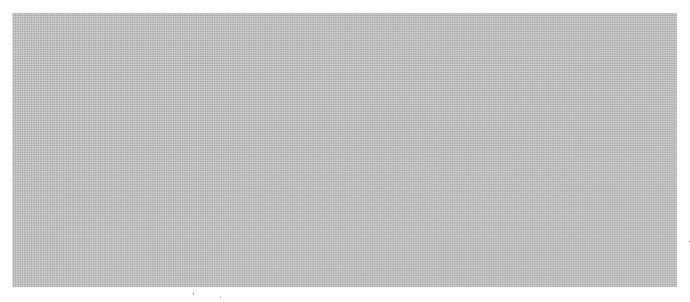
A clinical trial in Vancouver (the SALOME study, 2011-2015), compared the outcomes of treatment with hydromorphone (an approved drug in Canada) and pharmaceutical-grade heroin (diacetylmorphine) in the treatment of chronic opioid dependence. Practitioners at the clinical trial site, Providence Health Care Society (PHCS), requested access to pharmaceutical-grade heroin through Health Canada's Special Access Programme (SAP) for some patients who were part of SALOME. In September 2013, Letters of Authorization for access were issued for 21 patients. Subsequently, in October 2013, amendments were made to the *Food and Drug Regulations* (FDR), which made pharmaceutical-grade heroin a restricted drug and thereby ineligible for authorization by the SAP.

Page 4 of 7 revs mlu 23 Mar 2016-005605 - Tab 2 BN - Pivot

On November 13, 2013, Providence Health Care Society et al. (the plaintiffs) filed an action against Canada on behalf of persons with severe opioid addiction who have previously not responded to other available treatments. All plaintiffs were part of the SALOME study. The action relates to requests for pharmaceutical-grade heroin under the SAP. It challenges the constitutional validity of sections of the FDR that were amended to prevent Health Canada from authorizing, for the purposes of emergency treatment, the sale of certain controlled substances under the SAP. The British Columbia Supreme Court released a decision on an Injunction Motion in mid-2014 that allows practitioners to apply for access to pharmaceutical-grade heroin through the SAP for patients who were part of the SALOME clinical trial.

s.21(1)(a)			
s.21(1)(b)			
s.23			

CONSIDERATIONS



Page 5 of 7 revs mlu 23 Mar 2016-005605 - Tab 2 BN - Pivot

Page 27 is withheld pursuant to sections est retenue en vertu des articles

21(1)(a), 21(1)(b), 23

of the Access to Information Act de la Loi sur l'accès à l'information

s.21(1)(a) s.21(1)(b)

Talking points have been prepared for your meeting and are located in Annex 1.

CONCLUSION

ANNEXES

Annex 1: Talking points

PREPARED BY
Amanda Scott
Senior Analyst/Researcher
Youth Justice and Strategic Initiatives Section,
Policy Sector
613-220-3720



Ministère de la Justice Canada

> **Tab 2** SECRET 2016-005605

Talking Points

Meeting with Pivot Legal Society: Harm Reduction

- Thank you for sharing your concerns and proposals with me today with respect to drug policy.
- Our government is committed to protecting the health and safety of all Canadians. We recognize that substance abuse can have devastating effects on the well-being of individuals, families, and communities.
- We recognize that evidence-based harm reduction measures are an important part of a comprehensive approach to drug control and substance abuse. We look forward to continuing to make progress on that front.

PREPARED BY
Amanda Scott
Senior Analyst/Researcher
Youth Justice and Strategic Initiatives Section, Policy Sector
613-220-3720

s.21(1)(a) s.21(1)(b)

Tab 3



Darcie Bennett Interim Executive Director, Pivot Legal Society

Darcie first joined the Pivot team as a researcher in 2006. Since then, she has held several positions including Child Welfare Campaigner, coordinator of the Jane Doe Legal Network, and Campaigns Director. In 2014, Darcie moved to Ecojustice, Canada's only national environmental law charity, to serve as the Director of Communications and Marketing. She re-joined the Pivot team in January 2016. Darcie holds a PhD in sociology from the University of British Columbia.



Kerry Porth Board Chair, Pivot Legal Society

Kerry Porth is a well respected sex work educator and policy expert. From 2006-2012 she was the executive director of PACE Society, a small charity located in Vancouver's downtown east side that offers support, education and advocacy to local street based sex workers. Currently she works as a community developer and educator with

Living in Community (www.livingincommunity.ca) which is a project that brings together diverse perspectives to increase the health and safety of sex workers and respond to community concerns relating to sex work. Kerry has worked with police forces and government to improve policy regarding the sex trade and is a passionate activist for the human rights of sex workers.



Brenda Belak Staff Lawyer, Pivot Legal Society

Brenda Belak is a lawyer and sex workers' rights campaigner at Pivot Legal Society, where she engages in strategic litigation to advance the health, safety and human rights of sex workers. In addition to practicing

Aboriginal and natural resources law, Brenda was a policy researcher for the Missing Women Commission of Inquiry and the lead drafter of a bill on violence against women in Myanmar. Prior to becoming a lawyer, Brenda worked for more than a decade on international human rights issues. She has written a book about both women's human rights in Myanmar and using the Convention on the Elimination of All Forms of Discrimination against Women as a tool for advocacy.

Page 1 of 1 Biographies – Pivot Legal Society

Levman, Nathalie

From:

Levman, Nathalie

Sent:

2016-Jun-16 10:50 AM Ramcharan, Chantèle

To: Subject:

FW: URGENT ACTION REQUEST EGALE Just Society Report

Attachments:

EgaleReportAnalysisJune'16revisedJune15.docx

Importance:

High

From: Valin, Martine

Sent: 2016-Jun-15 12:14 PM

To: * SADMO/Admin <SADMO_Admin@justice.gc.ca>

Cc: Levman, Nathalie <Nathalie.Levman@justice.gc.ca>; Vaillant, Maryse <Maryse.Vaillant@justice.gc.ca>; * CLP

SGC/Admin < CLP_SGC_Admin@JUSTICE.GC.CA>; Glushek, Phaedra < Phaedra.Glushek@justice.gc.ca>

Subject: URGENT ACTION REQUEST EGALE Just Society Report

Importance: High

Approved by / approuvé par Phaedra Glushek for Carole Morency, Director General and SGC.

Martine Valin

Adjointe exécutive /Executive Assistant

Politique en matière de droit pénal / Criminal Law Policy

284 Wellington Street, Room 5093

Justice Canada

Ottawa, Ontario K1A 0H8

Tel: (613) 948-7423 Fax: (613) 957-6374

martine.valin@justice.gc.ca

From: Morency, Carole Sent: 2016-Jun-14 3:29 PM

To: Hébert, Nathalie < Nathalie.Hebert@justice.gc.ca >; * CLP SGC/Office < CLPSGC Office@justice.gc.ca >; Butcher, Nicole

<Nicole.Butcher@justice.gc.ca>; Desbiens, Alex <Alex.Desbiens@justice.gc.ca>; Patry, Claudine

<Claudine.Patry@justice.gc.ca>

Cc: * SADMO/Admin <SADMO Admin@justice.gc.ca>; Ministerial Liaison Unit <MLU@justice.gc.ca>; Levman, Nathalie

<Nathalie.Levman@justice.gc.ca>; MacCallum, Raymond <Raymond.MacCallum@justice.gc.ca>

Subject: RE: URGENT ACTION REQUEST EGALE Just Society Report

Hi everyone – copying everyone after discussions with Nicole and Claudine.

Agreement to re-task to match up with responsibilities in the Dept.

Nathalie Levman in CLPS will hold the pen and consolidate input from others, together with her own.

Public Law/CAILS: (Nicole will confirm who)

1. An Apology for Canada's History of LGBTIQ2S Persecution

Criminal Law Policy

- 2. Reform of the Criminal Code's anti-LGBTIQ2S provisions, including (Nathalie can consult with Ray)
- a. Repealing the Ban on Anal Intercourse (s. 159)
- b. Repealing the Bawdy House Laws (ss. 210, 211)
- c. Amending Sex Work Laws
- 3. Reform of Prosecutorial Practices including (Nathalie will consult with our policy counterparts at PPSC)
- a. Restricting historic prosecutions of Gross Indecency to ensure parity between Sexual Orientations
- b. Restricting the prosecution of HIV Non-Disclosure cases under Aggravated Sexual Assault
- 4. Expungement of Unjust Convictions (Nathalie will consult with our policy counterparts at PS)
- a. Considering the British and Australian Precedents
- b. Removal of every single record in every through an expungement act
- 5. Compensation for Unjust Government Action (CAILS may have some input on this? TBC)
- a. Considering the German Precedent
- b. Including the Restoration of Military and Bureacratic Pensions
- c. Including compensation for unjust Criminal prosecutions and convictions.
- 6. Recognizing and Memorializing LGBTIQ2S Injustice, including
- a. Rehabilitating indigenous Two Spirit culture.
- b. Working with provincial governments to ensure queer inclusion, as appropriate, at all levels of the K-12 educational curriculum
- c. Police, prosecutor and judicial training regarding LGBTIQ2S+ issues and culture generally

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Ministerial Liaison Unit < MLU@justice.qc.ca>

Sent: Tuesday, June 14, 2016 2:42 PM

To: * SADMO/Admin; Butcher, Nicole; Desbiens, Alex **Cc:** Ministerial Liaison Unit; * MLU Group; Patry, Claudine

Subject: URGENT ACTION REQUEST EGALE Just Society Report

Please use the attached approval slip / Veuillez svp utiliser la fiche d'approbation ci-joint

Please note that a formal briefing note is note requested. Simply send to MLU the material for your sector only.

MLU # / # ULM	Due in MLU / Date lin	nite At / À	
N/A	June 15, 2016	11:00 am	
Lead Sector / Secteur Responsable	2	Consultation	
N/A		Public Law & Policy Sector	
Topic / Sujet		•	
EGALE Just Society Report			
Request / Demande			

MO has asked if the department could provide a quick analysis (informal) of the EGALE recommendations listed below (at least those relevant to DOJ). A couple of bullets for each point, where possible, would be sufficient.

Public Law:

- 1. An Apology for Canada's History of LGBTIQ2S Persecution
- 2. Reform of the Criminal Code's anti-LGBTIQ2S provisions, including
- a. Repealing the Ban on Anal Intercourse (s. 159)
- b. Repealing the Bawdy House Laws (ss. 210, 211)
- c. Amending Sex Work Laws

Policy:

- 3. Reform of Prosecutorial Practices including
- a. Restricting historic prosecutions of Gross Indecency to ensure parity between Sexual Orientations
- b. Restricting the prosecution of HIV Non-Disclosure cases under Aggravated Sexual Assault
- 4. Expungement of Unjust Convictions
- a. Considering the British and Australian Precedents
- b. Removal of every single record in every through an expungement act
- 5. Compensation for Unjust Government Action
- a. Considering the German Precedent
- b. Including the Restoration of Military and Bureacratic Pensions
- c. Including compensation for unjust Criminal prosecutions and convictions.
- 6. Recognizing and Memorializing LGBTIQ2S Injustice, including
- a. Rehabilitating indigenous Two Spirit culture.
- b. Working with provincial governments to ensure queer inclusion, as appropriate, at all levels of the K-12 educational curriculum
- c. Police, prosecutor and judicial training regarding LGBTIQ2S+ issues and culture generally

Please note that briefing notes should be limited to one to two pages, when possible, with additional information annexed to the note. The general templates posted on JUSnet should be used. Please use the MLU # mentioned above, and make sure that the CCM fields are accurate and are filled accordingly.

Please forward the electronic version (up to Protected B) of the briefing note to MLU-ULM@justice.gc.ca, or "Ministerial Liaison Unit" in the Global Address List. For material containing secret or cabinet confidence information, please bring the documents on a secure USB key to EMB 4262 or 4228. If you have any questions concerning this request, please do not hesitate to contact the MLU.

If this request should have been sent to a different sector, please reply to this email.

Veuillez noter que les notes d'information devraient se limiter à une ou deux pages, et toute information additionnelle devrait être jointe à la note en annexe. Les gabarits à utiliser se retrouvent sur le site intranet JUSnet. **Veuillez utiliser le # ULM mentionné cidessus,** et s'assurer que tous les champs de CCM sont adéquats et complétés en conséquence.

Veuillez transmettre la version électronique (jusqu'à Protégé B) de la note d'information à l'adresse <u>MLU-ULM@justice.gc.ca</u>, or "Ministerial Liaison Unit" dans la liste d'adresses globales. Si le matériel contient de l'information secrète ou confidence du cabinet, veuillez apporter les documents par clef USB au EMB 4262 ou 4228. N'hésitez pas à contacter l'ULM pour tout complément d'information à ce sujet.

Si cette demande aurait dû être envoyée à un différent secteur, s'il vous plaît répondez à ce courriel.

Merci,

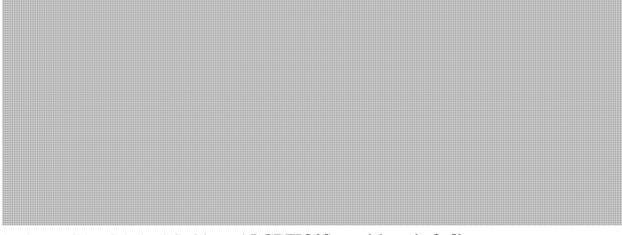
Sophie Bonenfant

Coordination Officer | Agente de coordination
Ministerial Liaison Unit | Unité de liaison ministérielle
Department of Justice Canada | Ministère de la Justice Canada
284 Wellington Street, Room 4260 | 284, rue Wellington, pièce 4260
Ottawa, Ontario K1A 0H8
Telephone | Téléphone 613-952-1509
B.B. 613-415-8204
sophie.bonenfant@justice.gc.ca

Brief Analysis of Recommendations in Egale's June 13, 2016 "Just Society Report" June 2016

MO has requested a short analysis of the recommendations made by Egale's June 13, 2016 "Just Society Report." As requested, brief analyses of each recommendation are provided below:

- 1. An Apology for Canada's History of LGBTIQ2S Persecution; and,
- 5. Compensation for Unjust Government Action
- a. Considering the German Precedent
- b. Including the Restoration of Military and Bureacratic Pensions
- c. Including compensation for unjust Criminal prosecutions and convictions.



- 2. Reform of the Criminal Code's anti-LGBTIQ2S provisions, including
- a. Repealing the Ban on Anal Intercourse (s. 159)
- b. Repealing the Bawdy House Laws (ss. 210, 211)
- c. Amending Sex Work Laws
 - a) Repeal Section 159 (anal intercourse)
 - Section 159 prohibits engaging in anal intercourse, except between a husband and wife or two persons 18 years or older, provided that the act is consensual and takes place in private. The offence treats anal intercourse differently from other forms of sexual activity (e.g., the age of consent is higher 18 rather than 16).
 - Four appellate courts and two trial level courts have found the offence to violate the *Charter*'s guarantee of equality (section 15) on the basis of age, marital status and sexual orientation. Courts have found that the offence has a disparate impact on homosexual males, and in particular youth.

	· 1
•	

b) Repeal Sections 210 and 211 (bawdy house)

c) Amending Sex Work Laws

- On December 6, 2014, the *Protection of Communities and Exploited Persons Act* (former Bill C-36) came into force in response to the Supreme Court of Canada's 2013 *Bedford* case, which struck down key *Criminal Code* prostitution provisions.
- The Act treats prostitution as a form of sexual exploitation of primarily women and girls
 by criminalizing the purchase of sexual services, as well as receiving a material benefit
 from others' prostitution and procuring others for that purpose (i.e., Canada's version of
 the Nordic Model, which was first implemented in Sweden and treats prostitution as a
 form of violence against women).

s.21(1)(a)

s.23

• The Minister has publicly stated that the adequacy of the Act in responding to the concerns raised by the Supreme Court of Canada's *Bedford* decision will be reviewed and that Canadians will be engaged in undertaking that review.

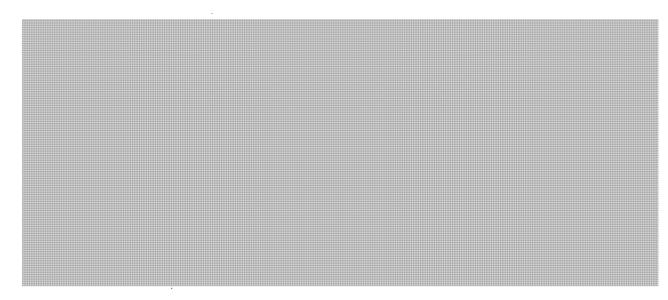
- 3. Reform of Prosecutorial Practices including
- a. Restricting historic prosecutions of Gross Indecency to ensure parity between Sexual Orientations
- b. Restricting the prosecution of HIV Non-Disclosure cases under Aggravated Sexual Assault

Prosecutorial Practices:

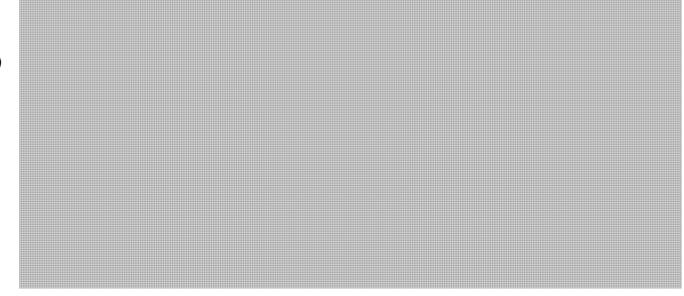
s.23

• While the Public Prosecution Service of Canada (PPSC) is responsible for prosecuting *Criminal Code* offences in the three territories, the majority of criminal offences in Canada are prosecuted by the provinces.

000037



- 4. Expungement of Unjust Convictions
- a. Considering the British and Australian Precedents
- b. Removal of every single record in every through an expungement act
 - The Minister of Public Safety Canada and Emergency Preparedness is the Minister who would be responsible for the expungement of criminal records. The Minister is examining the feasibility of granting expungements to persons convicted under section 159, and its predecessor offences of "buggery" and "gross indecency," if the underlying facts of the case demonstrate that the sexual activity was consensual and would not constitute an offence under current legislation, if it occurred today.
- 6. Recognizing and Memorializing LGBTIQ2S Injustice, including
- a. Rehabilitating indigenous Two Spirit culture.
- b. Working with provincial governments to ensure queer inclusion, as appropriate, at all levels of the K-12 educational curriculum
- c. Police, prosecutor and judicial training regarding LGBTIQ2S+ issues and culture generally



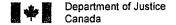
s.21(1)(a) s.21(1)(b)

s.23

Pages 39 to / à 43 are withheld pursuant to section sont retenues en vertu de l'article

23

of the Access to Information Act de la Loi sur l'accès à l'information



s.21(1)(a) s.21(1)(b) Ministère de la Justice Canada

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-019016
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: The Protection of Communities and Exploited Persons Act (former Bill C-36)

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- On September 8, 2016, you are scheduled to meet with Kate Quinn, Executive Director of the Centre to End All Sexual Exploitation (CEASE), an Edmonton-based, non-governmental organization that provides assistance to persons who are or have been involved in the sex trade. CEASE supports the overall approach of former Bill C-36 (i.e., the "Nordic Model"), but opposes any criminalization of sellers.
- You have stated publicly that you would review the adequacy of former Bill C-36 in responding to all the issues identified by the Supreme Court of Canada's *Bedford* decision, as well as to monitor the impact of these reforms.
- You have also indicated that the Government will be consulting those most affected by the new legislation in undertaking this review;

Soumis par (secteur)/Submitted by (Sector):

Policy Sector

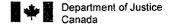
Responsable dans l'équipe du SM/Lead in the DM Team:

Caroline Leclerc

Revue dans l'ULM par/Edited in the MLU by:

Matt Ignatowicz

Soumis au CM/Submitted to MO: September 6, 2016



Ministère de la Justice Canada

Protected B FOR INFORMATION

2016-019016

MEMORANDUM FOR THE MINISTER

The Protection of Communities and Exploited Persons Act (former Bill C-36)

ISSUE

On September 8, 2016, you are scheduled to meet with Kate Quinn, Executive Director of the Centre to End All Sexual Exploitation (CEASE), an Edmonton-based, non-governmental organization that provides assistance to persons who are or have been involved in the sex trade.

BACKGROUND

CEASE provides services to both sellers and purchasers of sexual services and is the governing body that coordinates Edmonton's Prostitution Offender Program (i.e., "john school"), a post-court diversion program for purchasers of sexual services. Ms. Quinn, who has been providing services to persons involved in the sex trade for more than two decades and received the Edmonton Social Planning Council's Award of Merit for Advocacy of Social Justice in 2014, testified before the Standing Committee on Justice and Human Rights in July 2014 in support of former Bill C-36, the *Protection of Communities and Exploited Persons Act*. See Annex 1 for a brief biography of Ms. Quinn and Annex 2 for her testimony before the Committee.

The Bedford decision

In its December 20, 2013 *Bedford* decision, the Supreme Court of Canada (SCC) held that three key *Criminal Code* prostitution offences violated section 7 of the Charter (life, liberty and security of the person) on the basis that they prevented prostitutes from taking steps to protect themselves when engaging in a risky, but <u>legal</u>, activity. Although prostitution itself was not criminalized, almost all activities associated with it were prohibited, making it, in effect, virtually impossible to engage in prostitution-related activities without committing a criminal offence. The SCC found the following offences unconstitutional:

- The bawdy house offences (section 210) insofar as it applied to places kept or occupied for the purpose of prostitution because they prevented prostitutes from moving indoors, which the SCC found to be the safest way to sell sexual services;
- The living on the avails of prostitution offence (paragraph 212(1)(j)) because it prevented prostitutes from hiring bodyguards to protect them; and
- The offence prohibiting communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)) because it forced street prostitutes to forego screening potential clients.

The Protection of Communities and Exploited Persons Act (PCEPA)

The PCEPA (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and

Page 1 of 5 revs mlu 6 Sep 2016-019016 BN CEASE Meeting

girls (often referred to as Canada's version of the "Nordic Model;" see below). The PCEPA criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which makes prostitution <u>illegal</u> (the PCEPA immunizes sellers from prosecution for the role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3);
- advertising the sale of others' sexual services (section 286.4); and
- communicating for the purpose of selling sexual services in public places that are or are next to school grounds, playgrounds, and day care centres (subsection 213(1.1)).

These new offences replaced old offences that criminalized bawdy houses (section 210), procuring (section 212), and communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)). Two offences (paragraphs 213(1)(a) and (b)), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose of selling or purchasing sexual services.

The PCEPA also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which the PCEPA treats as related criminal conduct. Notably, in trafficking for sexual exploitation cases, both trafficking in persons and prostitution charges are frequently laid, among others.

Justice Canada's Bill C-36 Technical Paper¹ explains the *Bedford* case, the intended scope of the PCEPA's offences, its legislative objectives, and the evidence that informed its development. The Technical Paper was tabled before both the House of Commons Committee on Justice and Human Rights and the Senate Committee on Constitutional and Legal Affairs and forms part of the Parliamentary record.

Complementary funding

To complement Bill C-36's reforms, the Government has dedicated \$20 million in new funding to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through existing Justice Canada and Public Safety Canada funds to various non-governmental organizations, many of which supported Bill C-36's overall approach, as well as to certain police forces. For example, to date, thirteen non-governmental organizations are receiving funding through the Victims Fund to support their projects, which began in fiscal year 2014-2015, totaling \$8.7 million over the five years of the initiative. As well, 10 law enforcement agencies are also being funded over the initiative's five years, totaling \$0.7 million.

Debate on prostitution

Prostitution and the legal responses to it remain a divisive and controversial issue both within Canada and internationally. Some view prostitution as legitimate work, which should be decriminalized and regulated (i.e., supporters of decriminalization), while others view it as a form

Page 2 of 5

¹ Originally published in July 2014, updated in December 2014, and available online: http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf.

of sexual exploitation of women and girls, which must be ended (i.e., supporters of abolition, or the "Nordic Model"). Conflicting values of autonomy (i.e., protecting an individual's right to choose to sell their own sexual services by allowing sex work) vs. the public good (i.e., protecting the vulnerable people that research shows are drawn to prostitution by disallowing prostitution) drive the debate.

Both internationally and domestically, the prostitution debate generally centres on whether decriminalization or abolition is the appropriate legal response:

- Decriminalization: involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat prostitution like any other occupation and thereby reduce the risks and harm associated with it (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- Abolition ("Nordic Model"): involves criminalizing those who "exploit" sellers of sexual services (clients and third parties) and decriminalizing sellers themselves, who are viewed as victims and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for sexual exploitation (implemented in Sweden in 1999, Norway and Iceland in 2009, Canada in 2014, and France in 2016).

Prostitution/sex work terminology is charged: those who support decriminalization use the term "sex worker" to convey legitimacy; whereas, those who support the Nordic Model use the term "prostituted person" to convey exploitation. The term "prostitute" is generally rejected as stigmatizing, although the SCC used that term in its *Bedford* decision. This note uses the term "seller" to convey neutrality.

Stakeholders' views

s.21(1)(a)

s.21(1)(b)

s.23

Consistent with the divisive nature of this issue, former Bill C-36 was hotly debated in Parliament. Stakeholders who support decriminalization, vehemently opposed it, while stakeholders who support abolition, including anti-human trafficking activists advocated amending it to ensure that sellers of sexual services are not criminalized (i.e., repeal of section 213).

Available research

Evidence, including quantitative and qualitative research, exists to support both decriminalization and abolition. This evidence informed the development of the PCEPA; Justice Canada's Technical Paper references the significant body of research on prostitution/sex work that comes to diverse conclusions on the impact of the different legislative models.

Page 3 of 5 revs mlu 6 Sep 2016-019016 BN CEASE Meeting

Considerations	·		

s.21(1)(a) s.21(1)(b)

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ANNEXES

Annex 1: Biography of Kate Quinn

Annex 2: Ms. Quinn's July 10, 2014 Testimony before the Standing Committee on Justice

and Human Rights

Annex 3: Talking Points

PREPARED BY

Nathalie Levman Counsel Criminal Law Policy Section 613-948-7420

Annex 1: Biography of Kate Quinn

The CEASE website provides the following biographical information on Ms. Quinn:

Kate Quinn, Executive Director

Kate has worked with CEASE since 1996 when it was first known as PAAFE, the Prostitution Awareness and Action Foundation of Edmonton, the organization created to facilitate the Prostitution Offender Program for men charged with Section. 213 of the *Criminal Code* and the COARSE court diversion program for women charged under Section 213 of the *Criminal Code* (Note: women are no longer charged under the new law, *Protection of Communities and Exploited Persons Act*). Kate leads a small team of dedicated staff and volunteers who provide a range of supports from poverty relief to financial literacy and matched savings; from victim advocate services to trauma recovery counselling; from public education to funding for bursaries to help people create pathways out of exploitation. Kate works full-time for CEASE

Source: http://www.ceasenow.org/about/board-staff/

Annex 2: Ms. Quinn's July 10, 2014 Testimony before the Standing Committee on Justice and Human Rights

Ms. Kate Quinn (Executive Director, Centre to End All Sexual Exploitation):

Thank you, Mr. Chair, and honourable members of Parliament and all my sister and fellow panelists.

I also want to thank the technicians who made it possible for many of us to videoconference in to this important democratic process.

Our organization did send a letter to Madame Boivin and Mr. Casey and to Mrs. Smith, as well as a brief, which may have been translated in time. In our letters to the members of Parliament, we included a letter from a woman who was in massage and escort for seven years, a woman who was exploited through street prostitution for 22 years, a mother whose daughter is among the murdered victims in Edmonton, a man who was a former buyer, and a therapist who works to help women in their recovery from complex trauma. So they are with me, even though I am here alone.

Also, I carry the stories of grassroots community action to address the heavy impact of men cruising our communities. I remember the fear of children being harassed as they tried to go to school and being asked if they were working girls. Women standing at bus-stops, just trying to go shopping or whatever they had to do, were being harassed by men.

So I speak from a grassroots experience of people in Edmonton trying to do something about a complex issue. I think it's very important for us to state that we do not see this as a partisan issue. We do see it to be a human rights issue, a social justice issue, and a women's equality issue. Our organization would say that we come from the stance where we do not want to see any vulnerable person of any age or persons in vulnerable circumstances such as poverty or homelessness, or having no other jobs or sources of income, or with mental health or physical challenges. We want to live in a country that creates equality for all, and we do not want to see vulnerable people preyed upon in any way.

I think it's also important to remember that in our history as a country and a colony, the weight of the law and discrimination has been focused primarily on women. What we're seeing here is a shift. This is a shift that we would like to support. We see it as a 30-year generational shift. We won't see the fruits of the shift in this law for a few years, but we do think it's very important to shift the accountability for a harm that is generated to those who create that harm.

In Alberta and in the province of Manitoba, there have been many united actions of community groups, of groups led by women who have lived experience, by political leaders, by crown prosecutors, and by police. We have developed resources over the years that are appropriate and respectful of the persons seeking health care or any part of the continuum of harm reduction.

At the same time, the exploitation does continue, so we feel that it's important to shift the accountability to those who are demanding sexual services and creating that market for that industrialization of children and women.

In our brief, we do say that the criminalization of the activity of buying will have a positive effect, but that the criminalization of those who are providing has a very detrimental effect. We do not support the ability to arrest children, youth, and women who are in places where children might be present. We would like to see that section of this bill totally removed. We've lived too often with the discrimination that others have mentioned, and I can cite how in Edmonton, our capital region, the housing commission will not allow anyone with a criminal record to get subsidized public housing and how people who have a history of solicitation are not welcome in that housing.

Women who want to become social workers at our university cannot apply, because they have a criminal record. Many jobs that women apply for require criminal record checks. Many women just give up, because they do not want to talk about what they've been doing, because of the stigmatization.

In 1995, our organization wrote to the Minister of Justice of the day. We said that as ordinary people, we see that there's a power imbalance between the person who's cruising and the person who's standing on the corner, and we think we need to create different options. We went to work in our own city and created, with the crown prosecution office and the mayor and the Minister of Justice, the prostitution offender program.

The Minister of Justice of that day said that because the community raised this issue, we will charge the men the equivalent of a fine, about \$500, and we will return that money to the community to help heal the harm. So a multi-stakeholder group, including women who survived exploitation, parents whose daughters were on the street, front-line workers, and all the parties, identified that the priorities are poverty elimination, trauma recovery, bursaries so that people can rebuilt their lives, and public awareness and education.

In Alberta we have had a number of public education initiatives, but this education must be continual; it must be in the schools, around consent.

We must send a message. I'd like to see a message in every airport that in Canada we do not tolerate the buying and selling of people, so that men who are newcomers to our country know that in our country you cannot buy sexual services.

We'd like to see age-appropriate education directed at both those who may become vulnerable as well as those who may become perpetrators. Sadly, we're seeing that many young men are perpetrating violence against women, so we know that we need to look at how to educate our young men about what it is to be in a healthy and respectful relationship.

Our recommendations are that we support the direction of Bill <u>C-36</u>. We would like to see section 213 of the *Criminal Code* removed. We would like to see the investment in creative and positive social media and prevention education.

We would like to see more than \$20 million. I misunderstood; I thought that was \$20 million for one year. I can tell you that the groups working across the country, from PEERS Victoria Resource Society all the way across the country, would know well how to put that money to use to support women, men, and the transgendered wherever they are on the continuum.

We also think that it's important to establish a monitoring and evaluation process. Any law is a blunt instrument. There will be positive intended consequences; there will also be positive unintended consequences.

We had the past laws for almost 30 years. We think that we need to monitor every five years or so that we know what we are accomplishing by trying to set normative values in the law.

We also would like to see an easy mechanism established to wipe away and expunge the criminal records of anyone charged with section 213 in the past—any prostituted woman, male, or transgender—to remove this burden from their shoulders and welcome them into the fullness of our Canadian society.

In Scotland, while they still had some charges around prostitution, they just went away. No one had to apply for a pardon; the charges went away. We can do something; we can be creative: we're calling for this expunging of all the records of the past 30 years.

Those are our primary points. Thank you.

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Talking Points The Protection of Communities and Exploited Persons Act (former Bill C-36) Meeting with Kate Quinn of CEASE

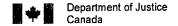
- First, I would like to thank you personally, as well as your organization, for your longstanding dedication to helping the vulnerable.
- I also very much appreciate your contributions to the prostitution debate; I have had the opportunity to review your testimony before the Standing Committee on Justice and Human Rights when it studied former Bill C-36, the *Protection of* Communities and Exploited Persons Act.
- We are reviewing the Act's measures and impacts as part of our ongoing review of the changes in our criminal justice system over the last decade.
- I am aware that the Act maintained some criminalization of sellers, which is inconsistent with the Nordic Model, as well as with decriminalization.
 My officials are examining this and other related issues.

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 We are committed to monitoring the impact of the Act, and will be engaging stakeholders in undertaking this review.

s.21(1)(a) s.21(1)(b)

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Ministère de la Justice Canada

FOR INFORMATION
NUMERO DU DOSSIER/FILE #: 2016-018979
COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Prostitution/Sex Work

s.21(1)(a) s.21(1)(b)

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- You have committed to review the adequacy of the *Protection of Communities and Exploited Persons Act* (former Bill C-36) in responding to all the issues identified by the Supreme Court of Canada's December 2013 *Bedford* decision, as well as to monitor the impact of these reforms.
- Internationally, there are four legal approaches to prostitution/sex work: decriminalization, legalization, abolition (i.e., the "Nordic Model") and prohibition; the debate generally centers on whether decriminalization or abolition is the appropriate legal response.
- The Department continues to monitor the impact of former Bill C-36's reforms.

Soumis par (secteur)/Submitted by (Sector):

Policy Sector

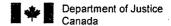
Responsable dans l'équipe du SM/Lead in the DM Team:

Caroline Leclerc

Revue dans l'ULM par/Edited in the MLU by:

Matt Ignatowicz

Soumis au CM/Submitted to MO: September 14, 2016



Ministère de la Justice Canada

> Protected B FOR INFORMATION

> > 2016-018979

MEMORANDUM FOR THE MINISTER

Prostitution/Sex Work

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BACKGROUND

Relevant legislative frameworks

All four legal approaches to prostitution/sex work attempt to address the risks associated with the practice, but in radically different ways:

- Decriminalization: involves the repeal of prostitution-related criminal law, leaving in place criminal laws of general application and other laws to deal with the sex industry. While some minimum level of prostitution-specific regulations may be implemented, the objective is to treat sex work like any other occupation (implemented in New Zealand and some Australian states, e.g., Australian Capital Territory).
- Legalization: involves the specific regulation of sex work through labour law or other legislation (e.g., work permits, licensing and/or tolerance zones). This approach treats sex work as a legal occupation, but controls it through a set of rules that govern who can work and under what circumstances (implemented in the Netherlands, Germany and some Australian states, e.g., Victoria).
- Abolition ("Nordic Model"): involves criminalizing those who "exploit" sellers of sexual services (i.e., clients and third parties) and decriminalizing the sellers themselves, who are viewed as victims of sexual exploitation and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for the purposes of sexual exploitation (implemented in Sweden, Norway and Iceland in 2009 and France in 2016; Canada implemented a version of this approach in 2014).
- Prohibition: involves prohibiting both the purchase and sale of sexual services, as well as the involvement of third parties in prostitution (implemented in the U.S.A., except one county in Nevada)

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Terminology

The terms "sex work" and "sex workers" are used by supporters of decriminalization and the terms "prostituted persons" and "prostitution" are used by supporters of abolition. This note uses the terms "sex work" and "prostitution," depending on the context, but the neutral term "sellers" is used to refer to those who sell their own sexual services, except in the summary of the Supreme Court of Canada's (SCC) *Bedford* decision, which used the term "prostitute."

Canadian context: the Bedford decision

In its December 20, 2013, *Bedford* decision, the SCC held that three key *Criminal Code* prostitution offences violated section 7 of the Charter (life, liberty and security of the person) on the basis that they prevented prostitutes from taking steps to protect themselves when engaging in a risky, but <u>legal</u>, activity. Although prostitution itself was not criminalized, almost all activities associated with it were prohibited, making it, in effect, virtually impossible to engage in prostitution-related activities without committing a criminal offence. The SCC found the following offences unconstitutional:

- The bawdy house offences (section 210) insofar as it applied to places kept or occupied for the purpose of prostitution because they prevented prostitutes from moving indoors, which the SCC found to be the safest way to sell sexual services;
- The living on the avails of prostitution offence (paragraph 212(1)(j)) because it prevented prostitutes from hiring bodyguards to protect them; and
- The offence prohibiting communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)) because it forced street prostitutes to forego screening potential clients.

The Protection of Communities and Exploited Persons Act (PCEPA)

The PCEPA (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and girls (often referred to as Canada's version of the "Nordic Model"). The PCEPA criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which makes prostitution <u>illegal</u> (the PCEPA immunizes sellers from prosecution for the role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3):
- advertising the sale of others' sexual services (section 286.4); and
- communicating for the purpose of selling sexual services in public places that are or are next to school grounds, playgrounds and day care centres (subsection 213(1.1)).

These new offences replaced old offences that criminalized bawdy houses (section 210), procuring (section 212) and communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)). Two offences (paragraphs 213(1)(a) and (b)), which pre-date Bill C-36 and were not at issue in *Bedford*, continue to apply. They prohibit stopping motor vehicles/impeding the free flow of pedestrian or vehicular traffic for the purpose

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of selling or purchasing sexual services. See Annex 3 for information on available statistics and Annex 4 for information on complementary funding.

The PCEPA also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which the PCEPA treats as related criminal conduct.

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Justice Canada's Bill C-36 Technical Paper, attached as Annex 5, explains the *Bedford* case, the intended scope of the PCEPA's offences, its legislative objectives, and the evidence that informed its development. The Technical Paper was tabled before both the House of Commons Committee on Justice and Human Rights and the Senate Committee on Constitutional and Legal Affairs and forms part of the parliamentary record.

Perspectives on former Bill C-36 and the Charter

Both before and during Parliament's consideration of former Bill C-36, open letters were published by lawyers and legal academics representing both sides of the debate. Supporters of abolition expressed the view that the Nordic Model protects the section 15 Charter rights of women, because prostitution generally involves men purchasing sexual services from women and girls. Supporters of decriminalization expressed the view that the Nordic Model violates the section 7 Charter rights of sex workers by making it less safe for them to practice their chosen profession (i.e., they maintain that prostitution-related criminal laws push the sex trade underground).

Stakeholders' views

Consistent with the divisive nature of this issue, former Bill C-36 was hotly debated in Parliament. Stakeholders who support decriminalization, vehemently opposed it, while stakeholders who support abolition,

advocated amending it to ensure that sellers of sexual services are not criminalized (i.e., repeal of section 213).

Stakeholders who support decriminalization have been advocating for the PCEPA's repeal since its enactment.

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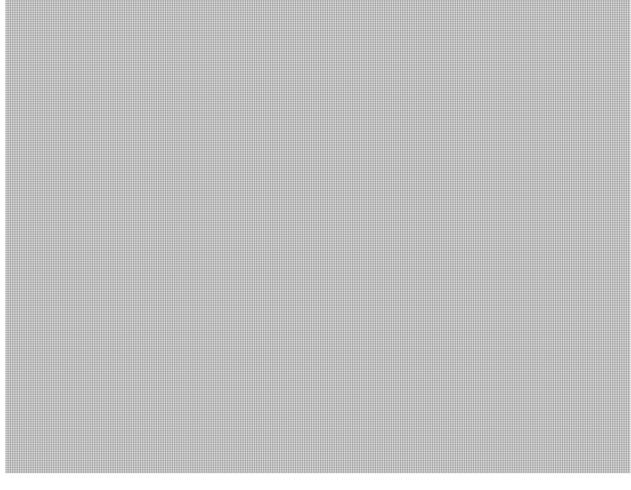
¹ https://bccla.org/wp-content/uploads/2014/07/LetterC36.pdf; http://www.straight.com/news/74235/open-lettercalls-nordic-approach-prostitution-canada.

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Evidence, including both quantitative and qualitative research, exists to support both decriminalization and abolition. This evidence informed the development of the PCEPA; Justice Canada's Technical Paper references the significant body of research on prostitution/sex work that comes to diverse conclusions on the impact of the different legislative models

CONSIDERATIONS

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CONCLUSION

s.21(1)(a) s.21(1)(b) s.23

ANNEXES

Annex 1:

Annex 2:

Annex 3: Available Statistics

Annex 4: Complementary Funding

Annex 5: Technical Paper on Bill C-36

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Annex 3: Available Statistics

Pre-Enactment of the PCEPA

Pre-PCEPA statistics indicated a law enforcement focus on both purchasers and sellers. For the three years preceding the release of the SCC's *Bedford* decision, Adult Criminal Court Survey statistics indicate the following:

In 2012/2013:

- 79 cases involved section 210 (bawdy house) as the most serious violation;
- 151 cases involved section 212 (procuring) as the most serious violation; and,
- 653 cases involved section 213 (communicating in public for the purpose of purchasing and selling) as the most serious violation.

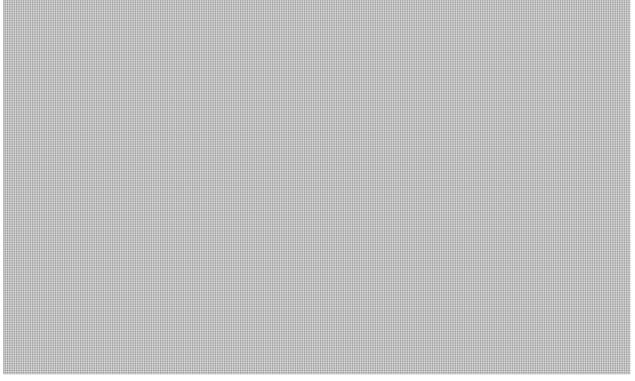
In 2011/2012:

- 109 cases involved section 210 (bawdy house) as the most serious violation;
- 105 cases involved section 212 (procuring) as the most serious violation; and,
- 820 cases involved section 213 (communicating in public for the purpose of purchasing and selling) as the most serious violation.

In 2010/2012:

s.14

- 139 cases involved section 210 (bawdy house) as the most serious violation;
- 99 cases involved section 212 (procuring) as the most serious violation; and,
- 1,334 cases involved section 213 (communicating in public for the purpose of purchasing and selling) as the most serious violation.



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of the Access to Information Act de la Loi sur l'accès à l'information

Annex 4: Complementary funding

To complement the PCEPA's reforms, \$20 million in new funding was dedicated to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through existing Justice Canada and Public Safety Canada funds to various non-governmental organizations, many of which supported Bill C-36's overall approach, as well as to certain police forces. For example, to date, 13 non-governmental organizations are receiving funding through the Victims Fund to support their projects, which began in fiscal year 2014-2015, totaling \$8.7 million over the five years of the initiative. As well, 10 law enforcement agencies are also being funded over the initiative's five years, totaling \$0.7 million.



TECHNICAL PAPER

Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts

(Protection of Communities and Exploited Persons Act)

Department of Justice Canada

2014

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Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act Updated on December 1, 2014

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Technical Paper: Bill C-36

This paper provides an overview of the Supreme Court of Canada's findings in its December 20, 2013 *Bedford* decision and explains the basis for the Government's legislative response: Bill C-36, the *Protection of Communities and Exploited Persons Act*, which received Royal Assent on November 6, 2014 (S.C. 2014, c.25).

I: Bedford v. Attorney General of Canada¹

In *Bedford*, the Supreme Court of Canada declared unconstitutional three *Criminal Code* offences addressing prostitution-related conduct on the basis that they violated section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). Section 7 protects the rights to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The offences at issue were:

- prohibition on keeping or being in a "bawdy house" for purposes of prostitution (section 210);
- prohibition on living on the avails of prostitution (paragraph 212(1)(j)); and,
- prohibition on communicating in public for purposes of prostitution (paragraph 213(1)(c)).

The Court suspended the declaration of invalidity for 12 months "considering all the interests at stake" and recognizing that "how prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated." The declaration of invalidity would have taken effect on December 20, 2014, if Parliament had not enacted Bill C-36.

Application of section 7 analysis to the offences at issue in Bedford

The Court found that the three offences sufficiently contributed to increasing the risks of harm experienced by prostitutes such that the offences infringed their right to security of the person. The Court affirmed the application judge's holding that the evidence showed that the offences

prevented people "engaged in a risky — but legal — activity from taking steps to protect themselves from the risks".³

The Court went on to find that the legislative objectives of the bawdy house and communicating offences, which were primarily aimed at addressing public nuisance and community harms associated with prostitution, were far outweighed by the negative impacts of these offences on prostitutes' safety and security. The Court also concluded that the living on the avails offence went further than it needed to in order to address its legislative objective of preventing the exploitation of prostitutes and was, therefore, overbroad. The offences were therefore contrary to the principles of fundamental justice. More specifically, the Court found:

- The bawdy house offence (section 210) was **grossly disproportionate** in its serious impact on prostitutes' safety, since it prohibited "moving indoors" as a basic safety precaution. The heightened risks for prostitutes were not outweighed by the provision's objective, which the Court characterized as nuisance-related, namely "to combat neighborhood disruption or disorder and to safeguard public health and safety". 4
- The living on the avails offence (paragraph 212(1)(j)) was overbroad in scope relative to its objective, which is to "target pimps and the parasitic, exploitative conduct in which they engage", because it punished everyone who "lives on the avails" of prostitution without distinguishing between those who exploit prostitutes and those who could increase their safety and security (e.g., bodyguards, managers, or drivers) or provide other legitimate business services to prostitutes (e.g., accountants and receptionists).⁵
- The communicating offence (paragraph 213(1)(c)) was grossly disproportionate in its impact on prostitutes' safety relative to its objective, which the Supreme Court said was to "take prostitution off the streets and out of public view" in order to prevent the nuisance that street prostitution can cause. The provision's negative impact on the lives and safety of street prostitutes (e.g., by depriving them of an ability to screen customers before getting into their car) was a grossly disproportionate response to the nuisances caused by street prostitution.⁶

Throughout its analysis, the Court emphasized that the offences were directed at addressing the public nuisances and community health and safety issues caused by street prostitution and brothels, as well as the "parasitic exploitation" of prostitutes by pimps. The Court specifically found that the prohibitions were not directed at deterring prostitution more generally.⁷

Finally, the Court said that the Government had not presented evidence to justify the section 7 violations as reasonable limits demonstrably justified in a free and democratic society under section 1 of the Charter. In particular, the Court found that there was no evidence to show that the provisions were minimally impairing of the section 7-protected rights at stake, or that the positive impacts of the criminal prohibitions on broader societal interests outweighed their serious negative impacts on prostitutes' safety.

Other key points

The Court addressed only the challenged provisions, noting that the case was "not about whether prostitution should be legal or not. [It was] about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster." The Court also indicated that Parliament is not "precluded from imposing limits on where and how prostitution may be conducted" and recognized that "the regulation of prostitution is a complex and delicate matter."

The Court held that it did not need to decide the section 2(b) (freedom of expression) challenge to section 213 of the *Criminal Code*, previously upheld as constitutional by the Supreme Court of Canada in the 1990 *Prostitution Reference*, ¹⁰ given the findings in respect of section 7.

II: Response to Bedford: Bill C-36

The Supreme Court of Canada gave Parliament one year to respond to its findings in *Bedford*. Failing to respond legislatively would have resulted in decriminalization of most adult prostitution-related activities. Bill C-36 was introduced on June 4, 2014 in response to the *Bedford* decision. It received Royal Assent on November 6, 2014 and will come into force on December 6, 2014. Its overall objective is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible.

Bill C-36 was informed by the evidence before the courts in *Bedford*, as well as the decision itself, the public consultations conducted by the Government in February and March of 2014, jurisprudence interpreting existing prostitution-related *Criminal Code* offences, the available research on prostitution in Canada, including relevant Canadian Parliamentary reports, as well as available international research on prostitution, including relevant government reports from other jurisdictions. A bibliography of the research that informed the development of Bill C-36 is attached at Annex A.

a) Objectives of the Legislation
Bill C-36 reflects a significant paradigm shift away from the treatment of prostitution as "nuisance", as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls. Bill C-36 signals this transformational shift both through its statement of purpose, as reflected in its preamble, and its placement of most prostitution offences in Part VIII of the *Criminal Code*, Offences Against the Person. 11

Bill C-36's objectives are based on the following conclusions drawn from the research that informed its development:

• The majority of those who sell their own sexual services are women and girls. 12 Marginalized groups, such as Aboriginal women and girls, are disproportionately represented. 13

- Entry into prostitution and remaining in it are both influenced by a variety of socioeconomic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addiction.¹⁴
- Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it, ¹⁵ regardless of the venue or legal framework in which it takes place, ¹⁶ both from purchasers of sexual services and from third parties. ¹⁷
- Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.¹⁸
- Prostitution also negatively impacts the communities in which it takes place through a number of factors, including: related criminality, such as human trafficking and drug-related crime; exposure of children to the sale of sex as a commodity and the risk of being drawn into a life of exploitation; harassment of residents; noise; impeding traffic; unsanitary acts, including leaving behind dangerous refuse such as used condoms or drug paraphernalia; and, unwelcome solicitation of children by purchasers.¹⁹
- The purchase of sexual services creates the demand for prostitution, which maintains and furthers pre-existing power imbalances, and ensures that vulnerable persons remain subjected to it.²⁰
- Third parties promote and capitalize on this demand by facilitating the prostitution of others for their own gain. Such persons may initially pose as benevolent helpers, providers of assistance and protection to those who "work" for them. But the development of economic interests in the prostitution of others creates an incentive for exploitative conduct in order to maximize profits. Commercial enterprises in which prostitution takes place also raise these concerns and create opportunities for human trafficking for sexual exploitation to flourish. 22

Consequently, Bill C-36 recognizes that prostitution's victims are manifold; individuals who sell their own sexual services are prostitution's primary victims, but communities, in particular children who are exposed to prostitution, are also victims, as well as society itself. Bill C-36 also recognizes that those who create the demand for prostitution, i.e., purchasers of sexual services, and those who capitalize on that demand, i.e., third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution's harms.

Accordingly, Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice.

b) Offences: Purchasers and Third Parties

Purchasing Offence

Bill C-36 criminalizes, for the first time in Canadian criminal law, the purchase of sexual services. This new offence makes prostitution itself an illegal practice; every time prostitution takes place, regardless of venue, an offence is committed. In criminalizing those who create the demand for prostitution, Bill C-36 furthers its overall objective to reduce that demand, with a view to ultimately abolishing prostitution to the greatest extent possible.

Bill C-36's new purchasing offence prohibits obtaining sexual services for consideration, or communicating in any place for that purpose (section 286.1). This offence imposes maximum penalties of 5 years imprisonment where prosecuted by indictment and 18 months where prosecuted by summary conviction and escalating mandatory minimum fines. Purchasing sexual services from a person under the age of 18 is an even more serious offence. Although already prohibited in existing criminal law, ²³ Bill C-36 moves this offence to Part VIII of the *Criminal Code*, along with most other prostitution offences, and increases the maximum penalty from 5 to 10 years imprisonment and the applicable mandatory minimum penalty for a subsequent offence from 6 months to one year.

The purchasing offence is carefully tailored to its objective of reducing the demand for sexual services. It is based on the existing offence that prohibits obtaining sexual services for consideration from persons under the age of 18 years and, accordingly, jurisprudence interpreting that offence assists in defining the scope of the new offence. Jurisprudence that interprets the meaning of "prostitution" is also instructive, given that "prostitution" is defined as the exchange of sexual services for payment.²⁴

To determine whether a particular act constitutes a "sexual service for consideration" or "prostitution", the court will consider whether the service is sexual in nature and whether the purpose of providing the service is to sexually gratify the person who receives it. Specifically, a contract or agreement, whether express or implied, for a specific sexual service in return for some form of consideration is required.²⁵ In particular, the consideration must be contingent on the provision of a particular sexual service and the contract or agreement must be entered into before the sexual service is provided.²⁶ Sexual activity involving no expectation of getting paid for the services provided does not meet the test.²⁷ Sexual activity in the context of ongoing relationships also fails to meet the test, unless the evidence shows that the alleged consideration was contingent on the provision of a particular sexual service.²⁸ In one case, gifts given to the complainant were not viewed as consideration for sexual favours rendered, but rather as gifts given "dans le cadre plus large de la relation affective entre l'accusé et le plaignant".²⁹ Another case held that the phrase "sexual services for consideration" is not intended to apply to consensual actions between those having an affinity towards one another.³⁰

The following activities have been found to constitute a sexual service or an act of prostitution, if provided in return for some form of consideration: lap-dancing, which involves sitting in the client's lap and simulating sexual intercourse;³¹ masturbation of a client in the context of a massage parlour, whether or not the client climaxes;³² and, sado-masochistic activities, provided that the acts can be considered to be sexually stimulating/gratifying.³³ However, jurisprudence is clear that neither acts related to the production of pornography,³⁴ nor stripping³⁵ meet the test. In

most cases, physical contact, or sexual interaction, between the person providing the service and the person receiving it is required; however, acts for which consideration is provided that take place in a private room in a club and that are sexual in nature, but do not involve physical contact between the "client" and "performer", such as self-masturbation, have been found to constitute prostitution.³⁶

In short, whether a particular service meets the test outlined above is a factual determination to be made by a court. Applicable jurisprudence provides flexibility in addressing new ways of effecting prostitution, while also limiting the scope of such offences to acts related to prostitution, consistent with its objective of reducing demand for sexual services.

Advertising Offence

To complement the purchasing offence, Bill C-36 criminalizes, also for the first time in Canadian criminal law, advertising the sale of sexual services. This new offence targets the promotion of prostitution through advertisements, which contributes to the demand for prostitution. This approach is consistent with the legislation's overall objective of reducing the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible.

Bill C-36's new advertising offence criminalizes knowingly advertising an offer to provide sexual services for consideration (section 286.4). This offence imposes maximum penalties of 5 years imprisonment where prosecuted by indictment and 18 months where prosecuted by summary conviction.

The advertising offence targets persons who place advertisements in print media or post advertisements on websites. Publishers or website administrators could be held criminally liable as parties if they know of the existence of the advertisement and that the advertisement is in fact for the sale of sexual services. Bill C-36 also allows the court to order the seizure of materials containing advertisements for the sale of sexual services, as well as their removal from the Internet, regardless of who posted them, which is also consistent with Bill C-36's objective of reducing demand for prostitution.

Material Benefit Offence

Bill C-36 creates a new material benefit offence that modernizes the living on the avails of prostitution offence, which was found unconstitutional in *Bedford*. Consistent with Bill C-36's objective of continuing to denounce and prohibit the development of economic interests in the exploitation of the prostitution of others, as well as the institutionalization and commercialization of prostitution, Bill C-36 criminalizes receiving a material benefit from the prostitution of others in exploitative circumstances, including from participation in business activities involving prostitution from which third parties profit.

Specifically, the new material benefit offence criminalizes receiving a financial or other material benefit obtained by or derived from the commission of the purchasing offence (section 286.2). Where the victim is an adult, the maximum penalty is 10 years imprisonment; where the victim is a child, the maximum penalty is 14 years imprisonment and the mandatory minimum penalty is 2 years.

Bill C-36 does not prevent those who sell their own sexual services from entering into legitimate family and business relationships on the same basis as anyone else. In this regard, Bill C-36 narrows the scope of the material benefit offence through legislated exceptions, which clarify that the offence does not apply if the benefit is received:

- in the context of a legitimate living arrangement, for example by a spouse, child or roommate of the person who provides the benefit;
- as a result of a legal or moral obligation, for example by a dependent parent of the person who provides the benefit or where a gift is purchased with the earnings of prostitution;
- in consideration for goods or services offered on the same terms and conditions to the general public, such as by an accountant, landlord, pharmacist or security company; and,
- in consideration for a good or service that is offered informally, for example by a person who provides protective or administrative services, provided that the benefit received is proportionate to the value of the good or service provided and the person who provided the service did not encourage, counsel or incite the provision of sexual services.

None of these exceptions is applicable, however, if the person who received the material benefit from the prostitution of others:

- used or threatened to use violence, intimidation or coercion toward the person who provided the benefit;
- abused a position of trust, power or authority toward the person who provided the benefit;
- provided intoxicating substances to the person who provided the benefit to aid or abet that person's prostitution;
- engaged in conduct that would constitute procuring under the new procuring offence; or,
- received the benefit in the context of a commercial enterprise that offers sexual services for sale, such as a strip club, massage parlour or escort agency in which prostitution takes place.

These exceptions reflect jurisprudence that carves out exceptions to the living on the avails of prostitution offence. The "legitimate living arrangement" and "legal and moral obligation" exceptions find their origin in the Ontario Court of Appeal's 1991 *Grilo* decision, ³⁷ which was cited as an authority on these issues by the Supreme Court of Canada in *Bedford*. The exception related to goods and services offered to the general public originates in a line of cases starting with the 1962 House of Lords decision in *Shaw*. ³⁸ The fourth exception for services or goods provided for proportionate value responds to the Supreme Court of Canada's *Bedford* decision by exempting non-exploitative relationships. ³⁹ Also, Bill C-36 provides an extra layer of protection in cases involving persons who initially pose as a benevolent helper and thereby appear to be entitled to one of the exceptions; it removes the availability of any of the exceptions if any exploitative circumstances materialize.

Although "commercial enterprise" is not defined, the phrase has been interpreted in sentencing cases under the Controlled Drugs and Substances Act. 40 Courts apply a contextual analysis to determine whether a particular enterprise is commercial in nature, 41 which provides flexibility to the courts to find different types of enterprises, including informal ones, to be "commercial". In the context of Bill C-36, a "commercial enterprise" necessarily involves third party profiteering. Courts would likely take into account considerations such as the number of persons involved, the

duration of the activities and the level of organization surrounding the activities. The only type of enterprise that this phrase cannot capture is one involving individuals who sell their own sexual services, whether independently or cooperatively, from a particular location or from different locations. Bill C-36 does not allow for prosecution in these circumstances for reasons outlined in the section below. Otherwise, Bill C-36 provides flexibility to the courts to find different types of enterprises, including informal ones, to be "commercial" in nature.

Bill C-36 also reformulates the presumption that applied to the living on the avails offence (subsection 212(3)), which allowed a prosecutor to prove an element of the offence by introducing evidence that the accused lived with or was habitually in the company of a prostitute. Similarly, Bill C-36's proposed subsection 286.2(3) allows a prosecutor to prove that an accused received a financial or material benefit from the sexual services of another by introducing evidence that the accused lived with or was habitually in the company of a person who offers or provides sexual services for consideration. The application of this presumption takes into account the scope of the material benefit offence as narrowed by the exceptions.

In its 1992 *Downey* decision, the Supreme Court of Canada found that the subsection 212(3) presumption infringed the presumption of innocence as protected by section 11(d) of the *Charter*, but was justified as a reasonable limit under section 1. Specifically, the Court found that those who sell their own sexual services are often reluctant to testify against their "pimps", who "maintain control by the emotional dependence of prostitutes upon them or by physical violence" and that this problem is not unique to Canada, thereby justifying the enactment of a rebuttable evidentiary presumption.⁴²

Procuring Offence

Bill C-36 modernizes the procuring offences in subsection 212(1), which used antiquated language and created significant overlap between offences by criminalizing similar conduct effected in different ways. Consistent with Bill C-36's objective of continuing to denounce and prohibit the procurement of persons for the purpose of prostitution, Bill C-36 prohibits comprehensively all conduct related to procuring others for the purpose of prostitution.

Specifically, the procuring offence criminalizes procuring a person to offer or provide sexual services for consideration or recruiting, holding, concealing or harbouring a person who offers or provides sexual services for consideration, or exercising control, direction or influence over the movements of that person, for the purpose of facilitating the purchasing offence (section 286.3). Where the victim is an adult, the maximum penalty is 14 years imprisonment; where the victim is a child, the maximum penalty is 14 years imprisonment and the mandatory minimum penalty is 5 years.

Bill C-36's procuring offence can be proven in one of two ways. First, the offence can be proven if the accused "procured" another person for the purposes of prostitution. The term "procure" has been interpreted by the Supreme Court of Canada as meaning "to cause, induce or have persuasive effect," which necessarily entails active involvement in the prostitution of another on the part of the accused. Second, the offence can be proven if the accused recruited, held, concealed or harboured a person for the purposes of prostitution or exercised control, direction or influence over the movements of a person for that purpose. This approach builds on existing

jurisprudence interpreting one of the existing procuring offences⁴⁴ and the human trafficking offence, ⁴⁵ both of which use some of the same language as found in new section 286.3.

The difference between the material benefit and the procuring offences hinges on the level of involvement in the prostitution of other persons. As with the procuring offences replaced by Bill C-36, the new procuring offence requires active involvement in the provision of another person's sexual services; whereas, passive involvement is sufficient to make out the material benefit offence. For example, a "classic pimp" is likely to be caught by both the procuring offence and the material benefit offence, because pimps generally induce or cause others to offer or provide their sexual services and they economically benefit from that activity. In contrast, a person who derives a benefit from the prostitution of others, without actively inciting the provision of sexual services, such as a "bouncer," who works at a strip club and knows that prostitution takes place there, is only caught by the material benefit offence. This difference justifies the imposition of higher penalties for procuring.

c) Immunities: Sellers

Bill C-36 criminalizes the purchase but not the sale of sexual services. However, Bill C-36 in no way condones the sale of sexual services; rather, it treats those who sell their own sexual services as victims who need support and assistance, rather than blame and punishment. Research shows that individuals frequently engage in prostitution as a result of seriously constrained choices and/or because they have been coerced by unscrupulous individuals to do so. ⁴⁷ This asymmetrical approach is also intended to encourage those who sell their own sexual services to report incidents of violence and exploitation committed against them, rather than seeking to avoid detection by law enforcement.

Accordingly, Bill C-36 expressly immunizes from prosecution individuals who receive a material benefit from their own sexual services or who advertise those services. It also immunizes those who sell their own sexual services for any part they may play in the purchasing, material benefit, procuring or advertising offences in relation to the sale of their own sexual services. Such prosecutions would otherwise normally be available by operation of general provisions of the criminal law that impose criminal liability on persons for various forms of participation in offences committed by other persons (i.e., liability for aiding, abetting or counseling another to commit an offence, conspiring with another person to commit an offence or being an accessory after the fact to an offence). These immunities mean that individuals cannot be prosecuted for selling their own sexual services, whether independently or cooperatively, from fixed indoor or other locations, as long as the only benefit received is derived from the sale of their own sexual services.

d) Offences: Community Harms

Bill C-36 protects communities, and especially children, from prostitution's harms by imposing higher mandatory minimum fines on those who purchase sexual services or communicate for that purpose in specified locations, i.e., parks, schools, religious institutions and places where children could reasonably be expected to be present. In this way, Bill C-36 is intended to send a particularly strong message to purchasers about the harms their conduct causes to vulnerable communities in its effort to reduce the demand for prostitution.

Bill C-36 also achieves its goal of protecting communities by criminalizing communicating for the purposes of selling sexual services in specific locations that are designed for use by children. As introduced, Bill C-36 proposed a summary offence that would have criminalized communicating for the purposes of selling sexual services in public places where children can reasonably be expected to be present. The scope of this offence was narrowed by the Standing Committee on Justice and Human Rights to prohibit communicating for the purposes of selling sexual services in public places that are or are next to school grounds, playgrounds or daycare centres (section 213(1.1), as enacted). This prohibition applies at all times and remains a summary conviction offence with a maximum penalty of 6 months imprisonment.

The main objective of the offence, as enacted, remains the same – to protect children from exposure to prostitution, which is viewed as a harm in and of itself, because such exposure risks normalizing a gendered and exploitative practice in the eyes of impressionable youth and could result in vulnerable children being drawn into a life of exploitation. The offence also protects children from additional harms associated with prostitution, including from being exposed to drug-related activities or to used condoms and dangerous paraphernalia. In not criminalizing public communications for the purposes of selling sexual services, except in these narrow circumstances, Bill C-36 recognizes the different interests at play, which include the need to protect from violence those who sell their own sexual services, as well as the need to protect vulnerable children from prostitution's harms.

Bill C-36 also retains, but modernizes, existing paragraphs 213(1)(a) and (b), which were not at issue in the *Bedford* case. These offences criminalize stopping or attempting to stop motor vehicles or impeding the free flow of pedestrian or vehicular traffic in public places or places open to public view for the purpose of either purchasing or selling sexual services. These are summary conviction offences with maximum penalties of 6 months imprisonment. Their objective is to protect residents of communities in which prostitution takes place from harassment by both those who purchase and those who sell sexual services.

e) Safety Issues

First and foremost, Bill C-36 seeks to ensure the safety of all by reducing the demand for prostitution, with a view to deterring it and ultimately abolishing it to the greatest extent possible. However, Bill C-36 recognizes that its transformational paradigm shift will take time to realize; changing social attitudes can be a long process. Bill C-36's approach, therefore, acknowledges that some will remain at risk of, or subjected to, exploitation through prostitution, while this transformation occurs.

In response to this concern, Bill C-36 focuses law enforcement attention primarily on individuals who purchase sexual services, as well as on third parties who exploit individuals that sell sexual services. In addition, Bill C-36 does not prohibit individuals from taking certain measures to protect themselves when selling their own sexual services. In *Bedford*, the Supreme Court of Canada found that the impugned *Criminal Code* prostitution-related offences prevented sellers of sexual services from taking certain safety measures when engaging in a risky, but legal activity. These protective measures are: selling sexual services from fixed indoor locations, hiring persons who may serve to enhance safety and negotiating safer conditions for the sale of sexual

services in public places. Bill C-36 seeks to balance these concerns with other broader safety and societal concerns posed by prostitution more generally: the need to protect those subjected to prostitution from violence and exploitation; the need to protect communities from prostitution's harmful effects, including exposure of children; and, the need to protect society itself from the normalization of a gendered and exploitative practice. In addressing this complex interplay of issues related to safety, the Supreme Court of Canada's concluding comments in its *Bedford* decision were instructive:

I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure -- for example, permitting prostitutes to obtain the assistance of security personnel -- might impact on the constitutionality of another measure -- for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. 48

Bill C-36 addresses the Supreme Court of Canada's safety concerns in the larger context of all the harms, risks and dangers posed by prostitution in the following way:

Fixed Indoor Locations: The Supreme Court of Canada expressed concern that the existing prostitution offences prevent the selling of sexual services from fixed indoor locations, which the Court found to be a safer place to sell sex. Under Bill C-36, individuals cannot be prosecuted for selling their own sexual services, including from a fixed indoor location, whether independently or cooperatively.

Bodyguards and Drivers: The Supreme Court of Canada's second major concern was that existing offences prevent those who sell sexual services from hiring bodyguards and others who may enhance their safety. Bill C-36 carefully balances this safety concern with the need to ensure that exploitative third parties are criminalized. It achieves this goal by: criminalizing receiving a financial or other material benefit that is obtained by or derived from the purchasing offence; limiting the scope of the offence through legislated exceptions, including exceptions that apply to individuals who offer protective services; and, ensuring that none of the exceptions apply in exploitative circumstances.

Negotiating in Public Places: The Supreme Court of Canada's final concern was that individuals who sell their own sexual services should not be prevented from taking steps to negotiate safer conditions for the sale of sexual services in public places. One of the offences found unconstitutional by the Supreme Court of Canada criminalized all public communications for the purpose of either purchasing or selling sexual services. Bill C-36, on the other hand, creates, first, a new offence that criminalizes communicating in any place for the purpose of purchasing sexual services and, second, a separate offence that criminalizes communicating for the purpose of selling sexual services, but only in public places that are or are next to school

grounds, playgrounds or day care centres. This approach strikes a careful balance between the interests of two vulnerable groups: those who are subjected to prostitution and children who may be exposed to it. Notably, Bill C-36 does not prohibit persons who sell their own sexual services from communicating for that purpose, other than in public places that are or are next to school grounds, playgrounds or day care centres. 49

III: International Context

Canada is not alone in implementing a legislative approach to prostitution that views the practice as a form of sexual exploitation by targeting those who create the demand for it and those who capitalize on that demand. Sweden was the first country to implement such an approach in 1999, followed by Norway and Iceland in 2009, which is why Sweden's approach is referred to as the "Nordic Model". Furthermore, the Northern Ireland Assembly passed a bill that will criminalize paying for another person's sexual services in October 2014, ⁵⁰ Ireland's Joint Committee on Justice. Defence and Equality recommended the Nordic Model in June 2013 ⁵¹ and a March 2014 United Kingdom All-Party Parliamentary Report recommended implementation of a version of that approach. ⁵²

Moreover, the European Parliament endorsed the Nordic Model in February 2014⁵³ and, in April 2014, the Council of Europe recommended that member and observer states, which includes Canada, consider criminalizing the purchase of sexual services, as the most effective tool for preventing and combating human trafficking, and banning advertising sexual services and pimping.⁵⁴ The United Nations Committee on the Elimination of Discrimination against Women has also recommended or welcomed the criminalization of the purchase of sexual services and has stressed the importance of addressing the demand for prostitution.⁵⁵ In short, this approach is receiving growing international support as a sound policy approach, supported by an expanding body of evidence.

In 2008, the Swedish government appointed the Committee of Inquiry to Evaluate the Ban against the Purchase of Sexual Services, headed by Chancellor of Justice Anna Skarhed, a former Justice of the Supreme Court, to assess the ban against the purchase of sexual services from 1999 to 2008. The Committee of Inquiry concluded that the Nordic Model was successful in deterring purchasers of sexual services, decreasing the number of prostituted persons and clients, and gaining favorable public support. These conclusions were supported by other sources as well. Furthermore, the Swedish Government has seen no concrete evidence that prostitution has merely been displaced and not reduced, e.g., moved from outdoor to other arenas, such as indoor locations, since implementation of the Nordic Model, and evidence suggests that the criminalization of the purchase of sexual services has helped to combat prostitution and human trafficking for sexual purposes. Evidence of Inquiry to Evaluate the Ban against the Purchase of Sexual services has helped to combat prostitution and human trafficking for sexual purposes.

In July 2014, the Norwegian government released a report assessing the effects of its 2009 ban on the purchase of sexual services, ⁶¹ which came to similar conclusions as the Swedish research, including that the ban had reduced the demand for sexual services, thus contributing to an overall decrease in the extent of prostitution and human trafficking in Norway. Furthermore, the evaluation did not find any evidence of increased violence against women in street-based prostitution following the coming into force of the law. The report concluded that the criminalization of the purchase of sexual services in Norway had met its intended goals. ⁶²

Since its implementation, some have raised concerns that the Nordic Model would drive prostitution underground, make human trafficking more difficult to detect and impact the safety and well-being of vulnerable women. Although some studies, mostly qualitative, have been conducted on these issues, ⁶³ there is no concrete empirical evidence available to support the assertion that prostitution, which is already an underground activity given its nature and the prevalence of criminal elements even in decriminalized/legalized regimes, has been pushed further underground through the criminalization of purchasers.

On the other hand, research on the experience of countries such as Australia, Germany and the Netherlands shows that jurisdictions that have decriminalized or legalized prostitution tend to have larger sex industries than those that have not decriminalized or legalized prostitution. ⁶⁴ Jurisdictions that have decriminalized or legalized prostitution have also experienced an expansion of their overall sex industries post-legalization/decriminalization, ⁶⁵ especially outside the legal zones or regulated environments, ⁶⁶ and individuals who sell their own sexual services continue to be vulnerable to violence and exploitation at the hands of third parties. Research indicates that coerced prostitution and human trafficking have flourished in both legal and illegal sectors, ⁶⁷ and that social stigmatization of individuals who sell their own sexual services continues to prevail, while their overall "material conditions have not noticeably improved". ⁶⁸ Finally, two recent empirical studies have shown that decriminalization and legalization are linked to higher rates of human trafficking for sexual exploitation. ⁶⁹

Endnotes

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<sup>1</sup> Bedford v Attorney General of Canada, [2013] SCJ No.72.
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¹⁰ Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 SCR 1123.

11 By contrast, existing prostitution offences are all placed in Part VII, Disorderly Houses, Gaming and Betting.
12 Quebec, Conseil du Statut de la femme du Québec, La prostitution: il est temps d'agir (2012) at 28, online:
http://www.csn.qc.ca/c/document_library/get_file?uuid=9dfcb4ff-d60d-4c42-af9e-dfabadd202d5& groupId =24
64358. See Canada, Subcommittee on Solicitation Laws, The Challenge of Change: A Study of Canada's Criminal Prostitution Laws, (Ottawa: Standing Committee on Justice and Human Rights, 2006) at 10, online:
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2599932&Language=E&Mode=1&Parl=39&Ses
=1

=1.

Conseil du Statut de la femme du Québec, *supra* note 12 at 47-8. See Canada, Subcommittee on Solicitation Laws, *supra* note 12 at 12-3. See Melissa Farley et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2004) 2:3-4 Journal of Trauma Practice 33 at 37-8, online: http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf.

¹⁴ Canada, Subcommittee on Solicitation Laws, *supra* note 12 at 11-12. See Melissa Farley et al., *supra* note 13 at 48-9 and 65. See Conseil du Statut de la femme du Québec, *supra* note 12 at 29.

15 Conseil du Statut de la femme du Québec, supra note 12 at 52-55. See Melissa Farley et al., supra note 13. See Canada, Subcommittee on Solicitation Laws, The Challenge of Change, supra note 12 at 19-21. See Richard Poulin, "Prostitution et traite des êtres humains: controverses et enjeux" (2008) 45 Cahiers de recherche sociologique 135 at 4-5, online: http://sisvphe.org/IMG/pdf/Prost.traitePoulin.pdf. See Maddy Coy, Prostitution, Harm and Gender Inequality: Theory, Research and Policy (Burlington, VT: Ashgate, 2012). See Maddy Coy, Josephine Wakeling & Maria Garner, "Selling sex sells: Representations of prostitution and the sex industry in sexualised popular culture as symbolic violence" (2011) 34 Women's Studies International Forum 441 at 443. ¹⁶ Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" (Child & Women Abuse Studies Unit, London Metropolitan University, 2009) at 40-3, online: http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/Shifting Sands UK-HOMe-Office.pdf. See Melissa Farley, "Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized" (2004) 10:10 Violence Against Women 1087, online: http://projectrespect.org.au/system/files/Prostitution +Harms+Women.pdf. See NZ, Prostitution Law Review Committee, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, (New Zealand: Ministry of Justice, 2008), online: http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-reviewcommittee/publications/plrc-report/documents/report.pdf. See NZ, Prostitution Law Reform in New Zealand, Parliamentary Library Research Paper (NZ: Parliamentary Library, 2012), online: http://www.parliament.nz/ennz/parl-support/research-papers/00PLSocRP12051/prostitution-law-reform-in-new-zealand. See Melissa Farley, Prostitution and Trafficking in Nevada: Making the Connections (San Francisco: Prostitution Research and Education, 2007). See Jess N. Gibly, "Safe Sex for Sale: Is Legalizing Sex Work the Answer to Sex Trafficking in the Netherlands?" (2012) 4:1 International Journal of Undergraduate Research and Creative Activities at 1-11, online: http://commons.pacificu.edu/cgi/viewcontent.cgi?article=1004&context=ijurca. See Richard Poulin, "The legalization of prostitution and its impact on trafficking in women and children" (2005), online: http://sisyphe.org/article.php3?id_article=1596.

¹⁷ Conseil du Statut de la femme du Québec, *supra* note 12 at 34-42. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change*, *supra* note 12 at 17. See M. Dank et al. "Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities" (2014) The Urban Institute, online: http://www.urban.org/UploadedPDF/413047-Underground-Commercial-Sex-Economy.pdf.

² *Ibid* at paras 167-69.

³ Ibid at paras 60-92.

⁴ *Ibid* at paras 132-136.

⁵ *Ibid* at para 142.

⁶ *Ibid* at paras 158-59.

⁷ *Ibid* at paras 132-147.

⁸ Ibid at para 2.

⁹ Ibid at para 165.

http://www.rapercliefshelter.bc.ca/learn/resources/sake-equality-arguments-adapting-nordic-model-prostitution-lawcanada. See Mary Sullivan & Sheila Jeffreys, "Legalising prostitution is not the answer: the example of Victoria, Australia" (Coalition Against Trafficking in Women: Australia) at 12, online:

http://www.catwinternational.org/content/images/article/95/attachment.pdf.

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See subsection 212(4) of the Criminal Code.

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²⁶ Ibid. See R v Walkins, supra note 25. See also R v M.G.B., [2005] ABPC 215 (Alta. Prov. Ct.), in which the accused agreed to pay the complainant after the sexual act was completed; the court dismissed charges under subsection 212(4) without reasons, but convicted on child sexual offences.

²⁷ R v Lee, [1998] NWTJ No.113 (NWTSC).

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⁴⁰ Jurisprudence shows that courts will consider drug offences committed in the context of a "commercial enterprise" as an aggravating factor for the purpose of sentencing under the Controlled Drugs and Substances Act. R v Gobran, [2013] 308 OAC 12 (OCA).

⁴² R v Downey, [1992] SCJ No. 48 at para 46.

⁴³ R v Deutsch, [1986] SCJ No. 44 at para 32.

⁴⁴ See subsection 212(1)(h) of the Criminal Code, which prohibits, for the purposes of gain, exercising control, direction or influence over the movements of a person in such a manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally. See R v Perrault, [1997] RJQ 4 (QCA) interprets the meaning of "exercises control, direction or influence over the movements of..."

⁴⁵ See section 279.01 of the *Criminal Code*, which prohibits recruiting, transporting, transferring, receiving, holding, concealing or harbouring a person or exercising control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation. "Exploitation" is defined in section 279.04. These provisions were enacted in 2005. There is some jurisprudence interpreting the offence, for example: R c Urizar. [2013] JQ no. 132 (QCA) and R v Beckford and Stone, [2013] OJ No. 371 (Ont. SCJ), in which the constitutionality of section 279.011 (trafficking in children) was upheld. Section 279.011 is identical to section 279.01, with the exception that it imposes mandatory minimum penalties for trafficking children.

⁴⁶ A person who receives a material benefit in the context of a commercial enterprise that offers sexual services for consideration would not be entitled to any of the legislated exceptions to the material benefit offence, including the exception that applies to persons who offer protective services, by virtue of paragraph 286.2(5)(e). This approach is consistent with Bill C-36's objective of prohibiting the commercialization and institutionalization of prostitution.

See research referenced at notes 14, 21 and 22.

⁴⁸ Bedford, supra note 1 at para 165.

⁴⁹ Where such activity is found to be harmful to children but occurs in private places, such as in the child's home, other Criminal Code offences, such as corrupting children (section 172), may apply. Provincial/territorial child welfare legislation also allows for state intervention where a child is in need of protection.

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⁵² United Kingdom, All-Party Parliamentary Group on Prostitution and the Global Sex Trade, Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales, March 2014, online: http://prostitutionresearch.com/2014/04/29/shifting-the-burden-inquiry-to-assess-the-operation-of-thecurrent-legal-settlement-on-prostitution-in-england-and-wales/.

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ANNEX A

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Levman, Nathalie

From:

Valin, Martine

Sent:

2016-Sep-30 11:53 AM

To:

Levman, Nathalie, Morency, Carole

Cc: Subject: Glushek, Phaedra; * CLP SGC/Admin

s.21(1)(a)

Attachments:

RE: Urgent Document for MO meeting at 1

s.21(1)(b)

Made two small changes as requested by Phaedra.

Martine

From: Levman, Nathalie

Sent: September 30, 2016 11:33 AM

To: Morency, Carole < Carole. Morency@justice.gc.ca>

Cc: Glushek, Phaedra <Phaedra.Glushek@justice.gc.ca>; * CLP SGC/Admin <CLP_SGC_Admin@JUSTICE.GC.CA>

Subject: Urgent Document for MO meeting at 1

Importance: High

Here is the document revised as per Carole's last round of comments.

I have also included a link to the document that must be attached...

http://www.justice.gc.ca/eng/rp-pr/other-autre/rr14 09/rr14 09.pdf

Pages 105 to / à 107 are withheld pursuant to sections sont retenues en vertu des articles

21(1)(a), 21(1)(b)

of the Access to Information Act de la Loi sur l'accès à l'information

Online Public Consultation on Prostitution-Related Offences in Canada Final Results

Research and Statistics Division

Department of Justice Canada

2014

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Online Public Consultation on Prostitution-Related Offences in Canada

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1. Background

On February 17, 2014, on direction from the Minister of Justice, the Department launched a month-long online public consultation on prostitution-related offences in Canada. The consultation was open to all Canadians and sought their input to inform the response to the Bedford Decision. A national news release, as well as Facebook and Twitter posts, served to draw public attention to the consultation Web page. A discussion paper was provided on the consultation Web page, including background information, context on existing criminal laws governing prostitution and information on models that have been implemented in other countries.

Internationally, the law generally treats prostitution in one of three ways:

- **Decriminalization/legalization:** seeks to reduce the harms associated with prostitution by decriminalizing both the purchase and sale of sexual services and regulating the way in which prostitution takes place (implemented in Germany, the Netherlands, New Zealand and Australia);
- **Prohibition:** seeks to eradicate prostitution through the prohibition of both the purchase and sale of sexual services, as well as the involvement of third parties in prostitution (implemented in the U.S.A., except in Nevada); and
- **Abolition (the "Nordic Model"):** seeks to abolish prostitution through criminalization of those who exploit prostitutes (clients and third parties) and decriminalization of prostitutes themselves, who are viewed as victims of sexual exploitation and assisted through programs (implemented in Sweden, Norway and Iceland).

The Supreme Court found that these offences violate prostitutes' right to security of the person, as protected by section 7 of the Charter, by preventing them from taking measures to protect themselves while engaging in a risky, but legal, activity. Such protective measures include selling sexual services indoors, hiring bodyguards and drivers, and negotiating safer conditions for the sale of sexual services in public places.

The Supreme Court's decision does not take effect for one year. If there is no legislative response, the result of this decision would be decriminalization of most adult prostitution-related activities:

- indoor prostitution (e.g. in a house or apartment, massage parlour, or strip club);
- providing services to prostitutes (e.g. as a bodyguard or a driver); and
- communicating for the purposes of purchasing or selling sexual services in public places (e.g. in the street).

¹ The Supreme Court of Canada's decision in *Bedford v. Attorney General of Canada* found three *Criminal Code* prostitution provisions unconstitutional:

[•] the bawdy house offence with respect to the practice of prostitution (section 210 prohibits keeping and being an inmate of or found in a bawdy house);

[•] the living on the avails offence (paragraph 212(1)(j), which prohibits living in whole or in part on the earnings of prostitutes); and

[•] the communicating offence (paragraph 213(1)(c), which prohibits communicating in a public place for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute).

Online Public Consultation on Prostitution-Related Offences in Canada

Canadians were invited to respond to the online public consultation by filling out and submitting the online form or by sending an email directly to a "consultations-prostitution" email address. The consultation questions were as follows:

- 1. Do you think that **purchasing sexual services** from an adult should be a criminal offence? Should there be any exceptions? Please explain.
- 2. Do you think that **selling sexual services** by an adult should be a criminal offence? Should there be any exceptions? Please explain.
- 3. If you support allowing the sale or purchase of sexual services, what limitations should there be, if any, on where or how this can be conducted? Please explain.
- 4. Do you think that it should be a **criminal offence for a person to benefit economically** from the prostitution of an adult? Should there be any exceptions? Please explain.
- 5. Are there **any other comments** you wish to offer to inform the Government's response to the Bedford decision?
- 6. Are you writing on behalf of an organization? If so, please identify the organization and your title or role.

This research report outlines the results of the online public consultation, highlighting key findings related to the proportions of respondents who support or oppose criminalizing different aspects of prostitution. Canadians were invited and encouraged to participate in the consultation by way of a government news release and the use of social media throughout the consultation period.

2. Methodology

The Department's Research and Statistics Division compiled and analyzed responses to the online consultation. Throughout the course of the consultation, responses submitted via the online form were automatically transferred into a database for analysis. Analysis and roll-up of quantitative results were done using SAS (a statistical analysis program) and Microsoft Excel, with a combination of manual review and qualitative coding. The focus of the analysis was to identify the proportion of responses in which the respondent expressed a view in favour of or opposed to criminalizing different aspects of prostitution. This includes those who responded with "Yes" or "No" to the consultation questions, or those who expressed these views in different ways, e.g. "I don't think purchasing sex should be illegal."

3. Results

At the close of the online consultation on March 17, 2014, there were a total of 30,073 submissions to the online consultation form. There were also 959 direct emails sent to the

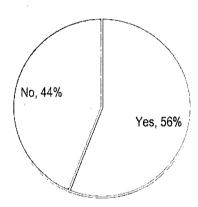
prostitution consultation email address.² As well, 140 responses were received via the Department's Ministerial Correspondence Unit, which includes responses forwarded to the Department of Justice via Status of Women Canada. Overall, a total of 31,172 responses were received.

3.1 Analysis of Consultation Questions

A total of 31,145 responses were analyzed, including online submission forms, direct email and paper submissions.³ This figure does not include the small number (27) of responses from individuals or groups outside of Canada.⁴

Question 1 asked whether respondents think that purchasing sexual services should be a criminal offence. Chart 1 shows that more than half (56%, or 15,993 known responses) felt that this activity should be a criminal offence, and 44% (12,418 known responses) felt that it should not.

Chart 1
Should purchasing sexual services be a criminal offence?



*Unknown/missing responses are not included and account for 9% of all responses.⁵

² This excludes emails that have no discernible feedback on prostitution (e.g. spam) but includes emails that discuss prostitution, even if they do not provide responses to the consultation questions, or advocate for a particular approach. Also, for groupings of responses that came in one email (e.g. a petition signed by multiple individuals), each individual response is counted separately.

³ Note that each question has a different number of total responses depending on the number of unknown/missing responses.

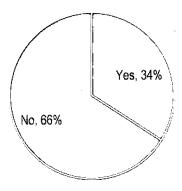
⁴ Twenty-seven of the responses to the online form were identified as having been submitted from an individual or group from outside of Canada (those that self-identified through their response to question 6). These responses are not included in the analysis, but have been reviewed separately.

⁵ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

Online Public Consultation on Prostitution-Related Offences in Canada

Question 2 asked whether respondents think that selling sexual services should be a criminal offence. Two-thirds of respondents (66%, or 17,801 known responses) felt that it should not be a criminal offence to sell sexual services, and 34% (9,121 known responses) felt that it should be a criminal offence (Chart 2).

Chart 2
Should selling sexual services be a criminal offence?



*Unknown/missing responses are not included and account for 14% of all responses.6

Question 3 asked whether those who support the sale or purchase of sexual services felt there should be any limitations on where and how it can be conducted. A keyword search was used to identify the types of limitations that respondents who answered this question felt should apply to where and how prostitution is conducted. Table 1 presents the number of times each of these keywords were mentioned, from most frequent to least frequent.

The most commonly mentioned limitations were related to public health. In particular, sexually transmitted disease/infection (STD/STI) testing was mentioned, with respondents highlighting the importance of health inspections of brothels and regular medical testing for those who provide sexual services. "Regulation, taxation and licensing" was the next largest category of responses, with respondents suggesting that taxation and licensing of those who provide sexual services were important. The terms "brothel," "bawdy house" and "red light" were often mentioned, with most of these respondents suggesting that prostitution should only take place in these contexts. The terms "street," "school," "residential" and "neighbourhood" were mentioned mostly by respondents opposing street-based prostitution or prostitution taking place in residential areas or near schools. Age was mentioned by respondents indicating that those who provide sexual services must be over a certain age (either the age of majority or over 21).

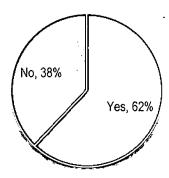
⁶ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

Table 1

What limitations should there be on how the sale or purchase of sexual services is conducted?	
Limitations	Number of times mentioned
Health Concerns (STD/STI)	6,431
Regulation/Taxation/Licensing	3,693
Street/ Schools/Neighbourhood/Residential	3,637
Brothel/Bawdy House/Red light	3,065
Age ("age of majority")	868

Question 4 asked respondents whether they think it should be a criminal offence to benefit economically from the prostitution of an adult. Almost two-thirds of respondents (62%, or 15,293 known responses) felt that it should be a criminal offence to benefit economically from the prostitution of an adult, whereas 38% (9,384 known responses) felt that it should not be a criminal offence (Chart 3). Many responses to this question, however, indicated that those who provide sexual services should be able to hire bodyguards and drivers, but that exploitive relationships (e.g. pimps) should be illegal.

Chart 3
Do you think that it should be a criminal offence to benefit economically from the prostitution of an adult?



*Unknown/missing responses are not included and account for 21% of all responses.7

⁷ These include responses that were left blank or worded in a way that did not allow them to be coded as "yes/no."

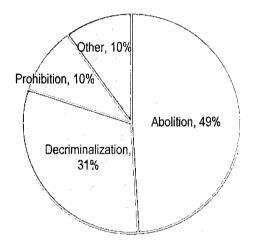
3.2 Responses from Organizations

A total of 117 organizations were identified as having submitted a response to the consultation. Groups that provide education, public awareness and/or front-line support and services, groups representing those who provide sexual services, police forces, municipalities and faith-based organizations were among the represented organizations. For reasons of confidentiality, the names of individuals or organizations who contributed to the online consultation are not being made public.

In order to identify these responses, a search of the database was conducted to identify those who answered "yes" to question 6, which asked whether the respondent was representing an organization. In addition, a keyword search was conducted using terms that would be used by someone responding on behalf of a group/organization (e.g. "behalf," "founder," "director," "president").

Overall, 57 organizations (49%) out of 117 supported the abolitionist approach or Nordic Model, and 36 (31%) supported decriminalization. The remainder either supported prohibition (12, or 10%) or provided more general comments that didn't necessarily directly correlate with abolition, decriminalization or prohibition (12, or 10%).

Chart 4
Responses from organizations by approach



4. Conclusion

The volume of responses to the Department's online consultation on prostitution-related offences is indicative of the significant level of public interest in, and engagement on, the issue of prostitution in Canada. The results show the following:

Online Public Consultation on Prostitution-Related Offences in Canada

- a majority (56%) of respondents felt that purchasing sexual services should be a criminal offence (44% felt it should not be);
- a majority (66%) felt that selling sexual services should not be a criminal offence (34% felt it should be); and
- a majority (62%) felt that benefiting economically from the prostitution of an adult should be a criminal offence (38% felt it should not be).

Levman, Nathalie

From:

Tremblay, Mylène

Sent:

2016-Nov-21 11:51 AM

To:

Levman, Nathalie

Subject:

RE: Issue Brief 5.4 on Prostitution

Attachments:

IB5 4Draft Prostitution (Clean - FINAL).docx

Here it is, thanks.

From: Levman, Nathalie

Sent: 21 novembre 2016 11:50

To: Tremblay, Mylène < Mylene. Tremblay@justice.gc.ca>

Subject: FW: Issue Brief 5.4 on Prostitution

We will need to include the final of this in that ATIP request (I am doing now)

From: Tremblay, Mylène Sent: 2016-Sep-13 3:00 PM

To: Kaufman, Katherine < Katherine.Kaufman@justice.gc.ca>; Brady, Erin < Erin.Brady@justice.gc.ca>

Cc: Levman, Nathalie < <u>Nathalie.Levman@justice.gc.ca</u>>

Subject: Issue Brief 5.4 on Prostitution

Hi Katie,

Please find the non-approved version of IB 5.4 on prostitution in attachment. Our SGC has confirmed that she would like to review the IB once we get your feedback (before it reaches your DG for approval).

Don't hesitate to contact me should you have questions or concerns.

Many thanks,

Mylène Tremblay

Counsel | Avocate

Criminal Law Policy Section | Section de la politique en matière de droit pénal

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5.4

CLUSTER 5 – Trafficking and exploitation of prostitution

Issue: Prostitution

KEY MESSAGES

- In its December 2013 Bedford decision, the Supreme Court of Canada held that three Criminal Code prostitution-related offences unjustifiably infringed the right to security of the person guaranteed under the Canadian Charter of Rights and Freedoms, because they prevented sellers of sexual services from taking steps to protect themselves while engaging in a risky, but legal, activity.
- The Protection of Communities and Exploited Persons Act (the "PCEPA"), which came into force in December 2014, responded to the Bedford decision by re-framing prostitution as a form of sexual exploitation of primarily women and girls, often referred to as Canada's version of the "Nordic Model".
- The PCEPA criminalizes the purchase of sexual services, receiving a
 material benefit from the sale of others' sexual services, advertising the
 sale of others' sexual services and procuring. It also protects those who
 sell their own sexual services from criminal liability for any part they may
 play in these offences.
- The PCEPA's reforms were complemented by \$20M in new funding over five years (2015-2020) to support a range of social programming for those who wish to leave prostitution.

 The Government of Canada has committed to review the adequacy of the PCEPA in responding to all issues identified by the Supreme Court in Bedford, as well as to monitor the impact of these reforms and engage stakeholders in this review.

SUPPLEMENTAL MESSAGES

Q1. What is the extent of the sex trade in Canada?

- Sex trade-related activities in Canada vary considerably, as do the venues in which they occur. They may occur on the street, through escort agencies, in massage parlours, in private apartments and houses, in strip clubs, in hotels or restaurants. Children who are exploited through the sex trade are uniquely vulnerable to harm.
- Canadian research undisputedly shows that:
 - The majority of sellers of sexual services are women and girls;
 - Indigenous women and girls are disproportionately represented among that group;
 - The vast majority of purchasers are men;
 - Involvement in the sex trade is influenced by a variety of socioeconomic factors, including poverty, youth, lack of education, child sexual abuse and drug addiction; and,
 - The sex trade poses significant risks to sellers.

Q 2. What has been the impact of the PCEPA so far?

- No formal statistics or reported case law are yet available in relation to the PCEPA's new offences, given their recent enactment. The Government is committed to conducting an evidence-based review of PCEPA's impact in Canada, including on sellers of sexual services, and to review its adequacy in responding to all issues identified by the Supreme Court of Canada in Bedford. Statistics Canada will review both pre-PCEPA prostitution-related data, and post-PCEPA prostitutionrelated data in 5 years, to assist in assessing the impact of the reforms.
- Informal data collected by the Royal Canadian Mounted Police "Human Trafficking National Coordination Centre" shows that prostitution-related charges have been laid in human trafficking for sexual exploitation cases both pre- and post-enactment of the PCEPA.

BACKGROUND INFORMATION

Relevant Legislative Frameworks

There are four main legal approaches to the sex trade which all attempt to address the risks associated with the practice, but in radically different ways:

Decriminalization: involves the repeal of prostitution-related criminal law, leaving
in place criminal laws of general application and other laws to deal with the sex
industry. While some minimum level of prostitution-specific regulations may be
implemented, the objective is to treat sex work like any other occupation
(implemented in New Zealand and some Australian states, e.g., Australian

Capital Territory).

- Legalization: involves the specific regulation of sex work through labour law or
 other legislation (e.g., work permits, licensing and/or tolerance zones). This
 approach treats sex work as a legal occupation, but controls it through a set of
 rules that govern who can work and under what circumstances (implemented in
 the Netherlands, Germany and some Australian states, e.g., Victoria).
- Abolition ("Nordic Model"): involves criminalizing those who "exploit" sellers of sexual services (i.e., clients and third parties) and decriminalizing the sellers themselves, who are viewed as victims of sexual exploitation and assisted through new funded programs. This approach seeks to reduce the demand for sexual services, which is viewed as directly linked to human trafficking for the purposes of sexual exploitation (implemented in Sweden, Norway and Iceland in 2009 and France in 2016; Canada implemented a version of this approach in 2014).
- Prohibition: involves prohibiting both the purchase and sale of sexual services, as well as the involvement of third parties in prostitution (implemented in the U.S.A., except one county in Nevada).

Despite the existence of these four approaches, the debate generally centers on whether decriminalization or abolition is the appropriate legal response. Stakeholders who support decriminalization reject legalization's controls on sex workers and point to New Zealand's decriminalization model as the most successful at reducing the risks associated with sex work. Stakeholders who support abolition reject legalization and decriminalization as facilitating the exploitation of vulnerable persons, primarily women and girls, and point to Sweden's approach; Sweden was the first country to implement what is now known as the Nordic Model. Both sides reject prohibition as oppressive to sex workers/prostituted persons.

Terminology

The terms "sex work" and "sex workers" are used by supporters of decriminalization and the terms "prostituted persons" and "prostitution" are used by supporters of abolition.

The neutral term "sellers" is used in this note to refer to those who sell their own sexual services, except in the summary of the Supreme Court of Canada's (SCC) *Bedford* decision, which used the term "prostitute."

Canadian Context: The Supreme Court of Canada Bedford Decision (Canada (AG) v Bedford, 2013 SCC 72)

In its December 20th, 2013 *Bedford* decision, the SCC held that three key *Criminal Code* prostitution offences unjustifiably infringed section 7 of the *Charter* (security of the person in particular) on the basis that they prevented prostitutes from taking steps to protect themselves when engaging in a risky, but legal, activity. Although prostitution itself was not criminalized, almost all activities associated with it were prohibited, making it, in effect, virtually impossible to engage in prostitution-related activities without committing a criminal offence. The SCC found the following offences unconstitutional:

- The bawdy house offences (section 210) insofar as it applied to places kept or occupied for the purpose of prostitution because they prevented prostitutes from moving indoors, which the SCC found to be the safest way to sell sexual services;
- The living on the avails of prostitution offence (paragraphs 212(1)(j)) because it
 prevented prostitutes from hiring bodyguards to protect them; and,
- The offence prohibiting communicating in public places for the purposes of purchasing or selling sexual services (paragraph 213(1)(c)) because it forced street prostitutes to forego screening potential clients.
- [For more detail on Bedford, see Issue Brief 2.3 on Remedies for violations of women's rights]

The Protection of Communities and Exploited Persons Act (PCEPA)

The *PCEPA* (former Bill C-36), which came into force on December 6, 2014, responds to the *Bedford* case by treating prostitution as a form of sexual exploitation of primarily women and girls (often referred to as Canada's version of the "Nordic Model"). The *PCEPA* criminalizes:

- the purchase of sexual services (section 286.1 of the *Criminal Code*), which
 makes prostitution <u>illegal</u> (the *PCEPA* immunizes sellers from prosecution for the
 role they play in the now illegal prostitution transaction);
- receiving a material benefit from the prostitution of others (section 286.2);
- procuring others to provide sexual services (section 286.3);
- advertising the sale of others' sexual services (section 286.4); and,
- communicating for the purpose of selling sexual services in public places that are
 or are next to school grounds, playgrounds and day care centres (subsection
 213(1.1)).

The *PCEPA* also contains some minor amendments to the human trafficking offences (sections 279.01 to 279.03) to ensure a consistent approach to both prostitution and human trafficking for sexual exploitation, which the *PCEPA* treats as related criminal conduct. Notably, in trafficking for sexual exploitation cases, both trafficking in persons and prostitution charges are frequently laid, among others.

Stakeholders' Views

Consistent with the divisive nature of this issue, former Bill C-36 was hotly debated in Parliament. Stakeholders who support decriminalization vehemently opposed it, while stakeholders who support abolition supported the Bill's overall approach but advocated amending it to ensure that sellers of sexual services are not criminalized (i.e., repeal of section 213).

Exit Strategy Programming

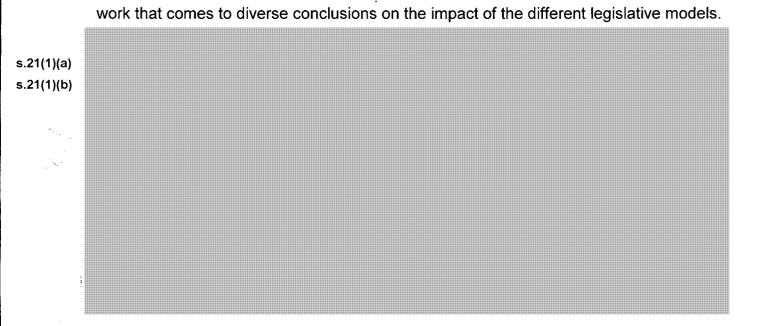
The *PCEPA*'s reforms were complemented by \$20M in new funding over five years (2015-2020) to support a range of social programming for those who wish to leave prostitution. This dedicated funding has been allocated through Justice Canada's Victims Fund and Public Safety Canada's Crime Prevention Action Fund. Exit strategy programming, which may include counselling, addiction recovery, trauma therapy, safe housing, skills building and education, financial literacy and employment training, is generally recognized by all sides of the debate as being an integral component to addressing the causes and consequences of prostitution.

To date, 12 NGO projects and 10 police service proposals have been funded through Justice Canada's Victims Fund. For instance, the Stepping Stone Association is currently implementing a project in Halifax that aims to reduce the barriers associated with exiting prostitution by providing prior learning assessment, mentorship, financial literacy programs and transitional support. Another example is the Envision Counselling and Support Centre's project whose purpose is to enhance crisis and long term support, counselling and advocacy services for those who wish to exit prostitution in Southeast Saskatchewan.

Moreover, funding provided by Public Safety Canada, through the Crime Prevention Action Fund, has been allocated to support 13 community-based projects across the country. Several of these projects will undergo a rigorous evaluation process to strengthen knowledge development regarding best practices in the area of exiting prostitution in Canada.

Available Research

Evidence, including both quantitative and qualitative research, exists to support both decriminalization and abolition. This evidence informed the development of the *PCEPA*; Justice Canada's Technical Paper (http://www.justice.gc.ca/eng/rp-pr/other-



autre/protect/index.html) references the significant body of research on prostitution/sex

RELATED ISSUE BRIEFS [5.1, 5.2, 5.3: TRAFFICKING AND EXPLOITATION OF PROSTITUTION]

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